Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

SHARON P.,

*Petitioner,*

v.

ARMAN, LTD., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Sharon P. was sexually assaulted in the underground parking structure of the commercial building where she was a tenant. She was the first victim of a sexual assault although there was evidence of other criminal activity including 7 prior bank robberies one floor up. The underground parking structure was dirty, dark and unkempt and represented a place where those bent on criminal enterprise could lie in wait. Criminal enterprise in such a setting was reasonably foreseeable. The simplest of security measures were not followed. No employee from either the landowner or parking company, located on the public lot at street level, was stationed in the underground tenant garage nor required to make periodic walk-throughs. Security cameras were in place above the elevators but were unplugged and inoperable. The building was a commercial highrise.

The trial court granted summary judgment ruling that no duty ran to the victim because there were no prior similar incidents in the underground parking garage to provide notice to the landowner or parking lot operator. The California Court of Appeal, Second Appellate District, reversed ruling that prior similar incidents were just one factor to be considered and that the totality of circumstances must be reviewed by a trier of fact. The California Supreme Court reversed and upheld the lower court's ruling essentially denying legal recourse to the first victim.

Does the "prior similar incidents" rule enunciated by the California Supreme Court in which they conclude that

## QUESTION PRESENTED – Continued

no duty runs to the first person injured on property by a third-party violate the due process and equal protection clauses of the Fourteenth Amendment?

## PARTIES TO THE PROCEEDING AT THE CALIFORNIA SUPREME COURT

Plaintiff and Appellant, Sharon P.

Defendant and Respondent, Arman, Ltd., a California Corporation.

Defendant and Respondent, Apcoa, Inc. d/b/a Parking Services, Inc., a Delaware Corporation.

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## RULE 29.6 STATEMENT

Parent and Subsidiary Corporations: None

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## PETITION FOR WRIT OF CERTIORARI

Sharon P. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in this proceeding on December 16, 1999, in order to resolve the conflict between California and various other jurisdictions.

## OPINIONS BELOW

The published opinion of the California Supreme Court that gives rise to this petition is reprinted in the Appendix hereto at App. 1. The depublished opinion of the California Court of Appeal, Second Appellate District, is reprinted hereto at App. 44.

## JURISDICTION

On December 16, 1999 the California Supreme Court issued a published opinion reversing the Court of Appeal, Second Appellate District opinion in favor of the petitioner.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257.

## STATUTES INVOLVED IN THIS CASE

The Fourteenth Amendment to the United States Constitution provides that *no state* shall "deprive *any person* of life, liberty, or property, without due process of

law." The California Constitution also contains due process guarantees. (Article I, §§ 7, 15).

The Fourteenth Amendment provides that *no state* shall "deny to *any person* within its jurisdiction the equal protection of the laws." Again, the California Constitution also contains equal protection guarantees. (Article I, § 7(a)). Additionally, the California Constitution goes further than the federal Constitution by requiring uniform operation of general laws (Article IV, § 16(a)).

Further, the California legislature has mandated that landowners maintain land in their possession and control in a reasonably safe condition. California Civil Code § 1714, subd. (a) provides:

> "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief."

The decision by the California Supreme Court in *Sharon P.* (App. 1) essentially takes away the rights and protections afforded by the California legislators, the California Constitution and the United States Constitution to the first victim of crime.

## STATEMENT OF THE CASE

The California Supreme Court has determined that a landowner and/or operator owes no duty to the first victim of third party criminal behavior concluding that the duty to protect against such potential harm does not arise until the landowner and/or operator has notice by "prior similar incidents." The effect is to always deny the first person injured any legal recourse.

## REASONS FOR GRANTING THE WRIT

### I. California's "Prior Similar Incidents" Rule Denies The First Victim Due Process And Equal Protection Under The Law.

This Court has never addressed the overarching issue raised by the "prior similar incidents" rule in premises liability cases, to wit, why is the first victim always without legal right when all who follow thereafter are protected by the law. The denial of a right to seek damages for harm simply because one is the first victim is a fundamental denial of equal protection and due process; what interest is so valuable as to deny the first victim the rights and protections afforded all other citizens.

The classification of that group of citizens as the "first victims" so as to deny them access to the courts and their claims to damages is arbitrary and capricious and serves no legitimate state purpose. Moreover, it is invidious discrimination against a group of citizens who should otherwise enjoy the same rights all citizens do.

The simple fact is that irrespective of what theory is advanced in support of a rule that precludes the first victim from reaching a jury of her peers, a denial of a right to redress available to all others, bears no rational relationship to any state purpose. It is patently unreasonable to eliminate an entire class of persons on the sole ground that they were the first persons injured. It irrationally singles out one class of individuals for discriminatory treatment.

Admittedly, the California Supreme Court's judgment herein is the enforcement of a common law action as between private parties, but the judicial action in this private litigation is, in the Petitioner's view, a denial of equal protection. And this Court has jurisdiction. *Shelley v. Kramer*, 334 U.S. 1 (1948). The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. *Shelley v. Kramer*, 334 U.S. 1, 22.

There is no constitutionally permissible reason to define a duty such that it imposes a burden the first victim can never meet. Indeed, to expose all first time victims to the greater risk of uncompensated injury than is faced by other individuals is clearly unreasonable.

The "prior similar incidents" rule creates an open season on the first victims and gives a windfall to the tortfeasors. This Court has held such consequences to be unconstitutional. *Glona v. American Guarantee Co.*, 391 U.S. 73 (1968).

Visiting a denial of rights on the head of a business invitee is illogical and unjust and contrary to the basic concept that legal burdens should bear some relationship

to individual responsibility or wrongdoing. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) [paraphrasing the reasoning].

That being said, this Court has indicated that the primary concern of the equal protection clause is that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Purdy & Fitzpatrick v. State of California*, 71 Cal.2d 566, 578 (1969). A single person, such as Sharon P., may invoke the constitutional protection on a showing of unequal treatment. *Gaines v. Canada*, 305 U.S. 337 (1938).

In *Sharon P. v. Arman, Ltd.*, Justice J. Werdegar, in her concurring and dissenting opinion, states as follows: "Emphatically, a landlord is not, as the prior similar incidents rule would have it, entitled to one free assault before the failure to take appropriate security measures subjects him or her to the risk of civil liability." (App. 30). Alas, one free assault is exactly what the decision of the majority determines, all to the end that people otherwise entitled to access to the court for redress of grievances are denied any relief simply because of their unfortunate timing; being first denies them access to a jury of their peers.

## II. The Decision Below Conflicts With Decisions Of Other Courts Of Last Resort Concerning The Constitutionality Of Denying The First Victim Legal Recourse.

The "prior similar incidents" rule has been criticized on several grounds by other jurisdictions, most notably

because it contravenes public policy and notions of fairness by allowing one "free" crime in all instances, thus providing no incentive to take preventative measures until the first victim is denied recovery. *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 414 (1997). Another criticism of the "prior similar incidents" rule is conflicting determinations regarding the requisite "similarity" of a previous incident. Courts have disagreed on whether the prior incident must involve personal injury, the relevant proximity in time of the prior incident and the necessary proximity in location. *Krier v. Safeway Stores 46, Inc.*, 943 P.2d at 414 (1997).

Jurisdictions that have rejected the "prior similar incidents" rule have recognized the harshness imposed by such an artificial rule and have adopted other approaches. Many courts have adopted the "totality of circumstances" test which allows the court to consider all of the surrounding circumstances, including the nature of the business and its location as well as prior similar incidents. Jurisdictions that have adopted this rule include: Pennsylvania [*Morgan v. Bucks Assocs.*, 428 F.Supp. 546 (E.D.Pa. 1977)], Florida [*Czerwinski v. Sunrise Point Condominium*, 540 So. 2d 199 (Fla.Dist.Ct.App. 1989)], Louisiana [*Willie v. American Cas. Co.*, 547 So.2d 1075 (La.Ct.App. 1989)], Minnesota [*Erickson v. Curtis Inv. Co.*, 432 N.W.2d 199 (Minn.Ct.App. 1988), aff'd, 447 N.W.2d 165 (Minn. 1989)], Nevada [*Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096 (1993)], North Carolina [*Forster v. Winston-Salem Joint Venture*, 303 N.C. 636 (1981)], South Dakota [*Small v. McKennan Hosp.*, 403 N.W.2d 410 (S.D. 1987)], Georgia [*Killebrew v. Sun Trust Banks, Inc.*,

221 Ga.App. 679 (1996)], and New Jersey [*Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496 (1997)].

Courts that have adopted the "totality of circumstances" rule generally do not distinguish between crimes against property and crimes against persons, recognizing that property crimes can easily escalate to violent crimes. These jurisdictions that apply the "totality of circumstances" rule consider all prior criminal incidents occurring on the landowner's premises and adjacent properties, whether similar or not, as well as other types of evidence such as the nature, location, condition, and the architectural design of the landowner's property. *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 509 (1997).

Yet other jurisdictions, in rejecting the "prior similar incidents" rule, have adopted a modified totality of circumstances rule that has been called "a balancing approach." *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 901 (Tenn. 1996). "The balancing approach acknowledges that duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty to be imposed." *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 901 (Tenn. 1996).

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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**IN THE SUPREME COURT OF CALIFORNIA**

| | |
|---|---|
| SHARON P., | S063612 |
| Plaintiff and Appellant, | Ct. App. 2/3 B094739 |
| v. | Los Angeles County Super. Ct. No. SC029060 |
| ARMAN, LTD., et al., | (Filed Dec. 16, 1999) |
| Defendants and Respondents. | |

In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666 (*Ann M.*), we discussed the scope of a commercial landlord's duty of care and affirmed it includes the taking of "reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (6 Cal.4th at p. 674.)

In this case, an unknown assailant sexually assaulted plaintiff at gunpoint in a commercial parking garage owned and operated by defendants. We must decide whether and to what extent defendants' duty of care to their tenants required that they provide security in the garage, when no assaults had occurred on the premises during the 10 years preceding the attack upon plaintiff. We conclude that the occurrence of a violent third party sexual assault in the subject garage was not sufficiently foreseeable to support such a requirement. We therefore reverse the contrary judgment of the Court of Appeal and

remand the matter to that court with directions to enter judgment in favor of defendants.

### Factual and Procedural Background

Plaintiff Sharon P. conducted an accounting business in a Los Angeles office building. She paid a monthly fee to park in an assigned space in the underground parking garage reserved for tenants of the office building.

On Thursday, April 8, 1993, at approximately 11:00 a.m., plaintiff parked in her assigned space. As she was preparing to leave her car, a masked assailant came up from behind. He held a gun to her head, forced her back into her car, and sexually assaulted her.

Plaintiff sued defendant Arman, Ltd. (Arman), the owner of the premises, and defendant Apcoa, Inc., doing business as Parking Services, Inc. (Apcoa), which provided parking services for Arman. The complaint alleged, among other things, that defendants' failure to provide adequate security for users of the parking garage resulted in the attack upon plaintiff. Plaintiff sought compensatory damages for pain and suffering, severe emotional distress, medical expenses and loss of income.

Following discovery, defendants moved for summary judgment on the basis that neither of them owed a duty to plaintiff to make the garage more secure because the attack on her was not reasonably foreseeable. The following evidence was submitted in support of and in opposition to defendants' motion.

Arman purchased the office building and parking garage in 1982. There is a bank on the ground floor of the

building, with its entrance facing southwest. To the north of the building is a surface parking lot for building visitors. A driveway on the east side of the building leads to a one-level subterranean parking garage reserved for building tenants. The tenant garage is approximately 200 feet by 225 feet and contains 79 marked parking stalls. Apcoa's parking attendant operates from a booth at the northwest corner of the visitors' lot, several hundred feet from the driveway entrance to the tenant garage.

Zacaria Simantob, a general partner of Arman, was responsible for daily management of the building. He knew of no incident, from 1982 to April 8, 1993, in which anyone was physically assaulted on the premises or was confronted with a firearm in the tenant garage. He was informed that armed robberies had occurred at the bank on the ground floor but, to his knowledge, none had involved criminal activity in the garage or personal injury. The bank's internal records show it had been robbed seven times between February 1991 and January 1993, with one report of physical injury.

Records of the Los Angeles Police Department reflect that a total of 363 crimes, including 2 rapes, occurred in the 50 square blocks surrounding the office building for all of 1992. During the first quarter of 1993, just prior to plaintiff's assault, 72 crimes, but no rapes, were recorded.

Plaintiff submitted a declaration claiming that the overall condition of the tenant garage had deteriorated during the several months preceding her attack. It was not unusual for several lights to be out, which would leave the garage darkened in several places. On the day of her attack, the garage "had several darkened areas that

provided vantage points from which someone lying in wait until after the morning influx of tenants could observe a lone woman arriving in her car as easy prey." Several darkened storage areas provided a place to hide. Plaintiff smelled urine at various times as she walked to and from the garage. She never saw defendants' employees monitor or inspect the garage, and in her view, the garage was not clean, well lit, safe or secure. After the attack, she learned that the security camera in the garage had not been working for several months.[1]

Defendants submitted a declaration from a private security consultant, retired Pasadena Police Chief Robert H. McGowan. McGowan inspected the tenant garage 17 months after plaintiff's assault and found the lighting "sufficient to clearly view from one side of the garage to the other in any direction." Although he conceded in his deposition that underground parking facilities are potential places for criminals to lie in wait, he believed that posting a security guard would have been an unreasonable burden on defendants because of the garage's small size and its minimal or no criminal activity, the relatively unobstructed view throughout the garage, and the presence of drivers entering and leaving. He also thought it

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[1] Plaintiff's attorney examined the garage 18 months after the attack and submitted a declaration substantially similar to plaintiff's. Arman filed objections to the declarations of plaintiff and her counsel in the trial court, but the record contains no rulings on those objections. We therefore deem the objections waived and view plaintiff's evidence as having been admitted in evidence as part of the record for purposes of the appeal. (*Ann M., supra*, 6 Cal.4th at p. 670, fn. 1; Code Civ. Proc., § 437c, subds. (b), (c).)

would have been unreasonable to require operation of a closed circuit television and to require someone to monitor and investigate anything that looked suspicious. In McGowan's view, the bank robberies on the ground floor did not indicate any greater likelihood of a sexual assault crime occurring in the underground garage because the bank is located on the other end of the structure from the garage entrance and the "behavior" of a bank robber is to immediately escape the area, not to lie in wait for a victim.

The trial court granted the motions based upon the foreseeability analysis articulated in *Ann M., supra,* 6 Cal.4th 666. Although noting plaintiff's evidence of other crimes occurring in the surrounding area, the court found it significant that there was no evidence of crimes occurring within the parking garage. Judgment was entered in favor of defendants.

The Court of Appeal reversed by a divided vote. The majority determined that *Ann M.* was not controlling because commercial parking structures such as the one here are "inherently dangerous" and, by their very nature, facilitate the commission of crime and increase its likelihood. The majority concluded that, notwithstanding the absence of prior incidents of sexual assault in the tenant garage, criminal assaults on patrons of the garage were highly foreseeable as a matter of law given the inherently dangerous nature of commercial underground garages, the increasing number of criminal assaults occurring in such structures generally, the physical conditions existing at this particular garage, and the seven serious felonies (robberies) occurring at the ground floor bank during the two-year period preceding plaintiff's

assault. After determining that the assault was foreseeable, the majority analyzed the policy considerations set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108 and concluded that defendants owed a duty of care to plaintiff to provide "reasonable" security in the tenant garage, which "might or might not include security guards." The matter was remanded to allow a jury to determine the issues of breach and causation based on the totality of the circumstances presented in the case.

The dissent criticized the majority for finding it foreseeable as a matter of law that criminal conduct will *always* occur in commercial underground parking structures. In its view, the majority improperly replaced *Ann M.*'s concept of duty based on foreseeability with an "inherently dangerous" condition theory. That theory, the dissent argued, would apply to numerous other types of properties, including residential parking structures, subways, office building hallways, residential building hallways, and movie theaters, and could be used to broadly expand the concept of foreseeability for other facilities such as all-night laundromats, emergency rooms, banks and college dormitories.

We granted defendants' petitions for review.

## DISCUSSION

To prevail on her action in negligence, plaintiff must show that defendants owed her a legal duty, that they breached the duty, and that the breach was a proximate or legal cause of her injuries. (*Ann M., supra*, 6 Cal.4th at p. 673.) Since defendants obtained summary judgment in their favor, "we review the record de novo to determine

whether they have conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial." (*Id.* at pp. 673-674.)

The existence of a duty is a question of law for the court. (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819; *Ann M., supra,* 6 Cal.4th at p. 674.) Likewise, "[f]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ann M., supra,* 6 Cal.4th at p. 678.) The critical issue in this case is whether a sexual assault by a third party in the tenant garage was sufficiently foreseeable to support a requirement that defendants secure that area against such crime.

Plaintiff offers two principal rationales for affirming the judgment of the Court of Appeal. First, she contends that, because underground commercial parking structures are inherently dangerous, they carry with them a higher foreseeability of violent criminal attacks with a corresponding obligation to provide more than just minimal security measures. Although plaintiff claims she "is not asking for security guards," she asserts that requiring security guards "is justified, should the court so find." Second, she argues that, even if the hiring of security guards was not required, the violent attack upon her was sufficiently foreseeable – due to the inherently dangerous nature of the parking garage, the prior bank robberies elsewhere on the premises and the statistical crime rate of the surrounding area – to impose upon defendants a minimal duty of protection. In plaintiff's words, "[s]imple things like a clean, brightly lit garage, with working security cameras, and periodic walk throughs

[by existing personnel], all give the appearance that someone cares about this garage and sends a message to any potential criminal to go elsewhere."

### A. *Ann M.* and the Hiring of Security Guards

By now it is well established that landowners must maintain their premises in a reasonably safe condition, and that in the case of a landlord, the general duty of maintenance includes "the duty to take reasonable steps to secure common areas against *foreseeable* criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M., supra*, 6 Cal.4th at p. 674, italics added.)

To resolve whether the sexual attack upon plaintiff was sufficiently foreseeable to require the hiring of security guards, we consider first *Ann M., supra*, 6 Cal.4th 666. In *Ann M.*, the plaintiff was raped while working at a photo store in a secluded area of the defendants' shopping center. (6 Cal.4th at pp. 670-671.) In opposition to the defendants' motion for summary judgment, the plaintiff presented evidence that, in the year preceding the attack, violent crimes had occurred in the census tract in which the shopping center was located. (6 Cal.4th at p. 671.) Transients loitering in the common areas had caused tenants and employees of the shopping center to be concerned about their safety. (*Ibid.*) There also was evidence that the defendants failed to provide security patrols despite a request by the merchants' association (6 Cal.4th at p. 672) and that assaults, purse snatchings and bank robberies may have occurred in the shopping center (6 Cal.4th at p. 671).

Emphasizing foreseeability as a "crucial factor" in determining the existence of duty, *Ann M.* determined that "a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated."[2] (6 Cal.4th at p. 676.) *Ann M.* then revisited *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112 (*Isaacs*), which had abandoned the traditional "prior similar incidents" rule of foreseeability in favor of an approach that focused on the "totality of the circumstances." (*Ann M., supra,* 6 Cal.4th at pp. 677-678.) In a departure from prior case law, *Isaacs* had concluded that foreseeability of harm ordinarily should be determined upon consideration of "what is reasonable in light of all the circumstances" and that the absence of prior similar incidents of crime did not negate the existence of a duty. (*Isaacs, supra,* 38 Cal.3d at p. 135.) The occurrence of prior similar incidents was deemed "helpful" to determine foreseeability, but "not required to establish it." (*Ibid.*)

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[2] In addition to foreseeability, other factors considered by courts in determining the existence and scope of a duty in a particular case include " 'the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' " (*Ann M., supra,* 6 Cal.4th at p. 675, fn. 5, quoting *Rowland v. Christian, supra,* 69 Cal.2d at p. 113.) These other factors may dictate against expanding the scope of a landowner's duty to include protecting against third party crime, even where there is sufficient evidence of foreseeability.

As noted in *Ann M.*, lower courts had questioned the wisdom of *Isaacs'* totality of the circumstances approach and California appeared to be the lone jurisdiction utilizing such a rule in the business landowner context. (*Ann M., supra,* 6 Cal.4th at pp. 677-678.) *Ann M.* was not reluctant to revisit *Isaacs* because viewing the totality of the circumstances had been unnecessary to the result in that case. (6 Cal.4th at p. 678.) That is, the foreseeability factor could have been met in *Isaacs* under the traditional rule requiring prior similar incidents. (*Ibid.*)

In contrast to *Isaacs*, *Ann M.* concluded that, in light of the vagueness of the obligation to provide patrols adequate to deter crime and the significant monetary and social costs that are implicated in imposing such an obligation, a "high degree of foreseeability" is required in order to find that the scope of a landowner's duty of care includes the hiring of security guards to protect against violent crime by third parties. (6 Cal.4th at p. 679.) *Ann M.* cautioned that the requisite degree of foreseeability "rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (*Ibid.*, fn. omitted.) "To hold otherwise," *Ann M.* emphasized, "would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well-established policy in this state." (*Ibid.*)

Applying its analysis to the record, *Ann M.* determined that the plaintiff there failed to establish the high degree of foreseeability necessary to require the posting of security guards in the common areas of the shopping center. (6 Cal.4th at pp. 679-680.) First, there was no evidence the defendants had notice of the assaults, purse

snatchings and bank robberies allegedly occurring on the premises. Second, even assuming there had been notice, the plaintiff had conceded that the prior crimes were not similar in nature to the violent assault she suffered. Finally, neither the evidence regarding the presence of transients, nor the evidence of the statistical crime rate of the surrounding area, was of a type sufficient to establish the requisite foreseeability. (6 Cal.4th at p. 680.)

If we were to apply the foregoing analysis in the present case, defendants were not required to provide security guards in their garage. Significantly, the prior robberies, which all specifically targeted a bank elsewhere on the premises and did not involve violent attacks against anyone, were not sufficiently similar to the sexual assault inflicted upon plaintiff to establish a high degree of foreseeability that would justify the imposition of such an obligation. (*Ann M., supra*, 6 Cal.4th at p. 680.) Moreover, the analysis forecloses the possibility that evidence of the statistical crime rate of the surrounding 50-block area, even if considered in combination with the bank robberies and the evidence that a person or persons urinated and slept in or about the garage prior to the assault, would be sufficient to establish the requisite foreseeability. (*Ibid.*)

Plaintiff argues that her injury was foreseeable, regardless of the absence of prior violent attacks on the premises. She relies on a footnote in *Ann M.* in which we commented: "*Ann M.* offered no evidence to show that, like a parking garage or an all-night convenience store, a retail store located in a shopping center creates ' "an especial temptation and opportunity for criminal misconduct." ' (*Gomez v. Ticor* [(1983) 145 Cal.App.3d 622, 628]

[victim killed returning to car in parking garage]; *Cohen v. Southland Corp.* (1984) 157 Cal.App.3d 130, 141] [robbery at all-night convenience store].) Therefore, we need not consider in this case whether some types of commercial property are so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner's duty of care." (*Ann M., supra,* 6 Cal.4th at p. 680, fn. 8.) In addition, plaintiff quotes extensively from *Gomez v. Ticor* (1983) 145 Cal.App.3d 622 (*Gomez*) to argue that violent crime in an underground commercial parking garage is highly foreseeable because the very nature of such structures makes them prone to third party criminal attacks on their patrons and users.

Upon careful deliberation, we reject the view that underground parking structures are "so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner's duty of care." (*Ann M., supra,* 6 Cal.4th at p. 680, fn. 8.) Several considerations factor into our decision.

First, we are not directed to any evidence or authorities from which we might confidently conclude that all underground parking structures, regardless of their individual physical characteristics and locations, are prone to violence and therefore are inherently dangerous in nature.[3] Moreover, a survey of the decisions cited to us by

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[3] The record on appeal contains no statistical data comparing the crime rate in parking garages with the rates for other types of properties. In this court, the parties and the dissent refer to various criminal victimization statistics published by the United States Department of Justice. As a

the parties and amici curiae indicates that above-ground commercial and residential buildings are just as prone to violent sex crimes by unknown third parties. (E.g., *Ann M., supra*, 6 Cal.4th at p. 671 [mall store]; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 498 [condominium unit]; *Pamela W. v. Millsom* (1994) 25 Cal.App.4th 950, 953 [condominium unit]; *Riley v. Marcus* (1981) 125 Cal.App.3d 103, 105 [apartment]; *Kwaitkowski v. Superior Trading Co.* (1981) 123 Cal.App.3d 324, 325 [apartment lobby]; *Wingard v. Safeway Stores, Inc.* (1981) 123 Cal.App.3d 37, 39 [commercial warehouse]; 7735 Hollywood Blvd. *Venture v. Superior Court (1981)* 116 Cal.App.3d 901, 903 [apartment]; *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802 [apartment].) In the absence of solid support for the categorical conclusion that all parking garages are inherently dangerous, and are distinctly so in comparison to other types of premises, we are reluctant to single out garage owners for imposition of the substantial monetary and social costs associated with the hiring of security guards.

Second, *Gomez, supra*, 145 Cal.App.3d 622, does not support adoption of a per se rule of foreseeability in cases involving underground parking structures. The *Gomez* court opined that violent crime in a parking garage *may* be foreseeable because: (1) cars and car stereos and contents located in such garages present tempting targets for thieves; (2) the "high walls, low ceilings and the absence

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procedural matter, we decline to consider such statistics since a proper request for judicial notice was never made. In any event, the conclusions drawn from the statistics are reasonably subject to dispute.

of the cars' owners" in garages give thieves and vandals time and privacy to complete their tasks; (3) the "deserted, labyrinthine nature" of garages, "especially at night, makes them likely places for robbers and rapists to lie in wait"; and (4) a garage patron who interrupts such crimes in progress could be violently attacked by the criminal. (145 Cal.App.3d at p. 628.) But *Gomez* did not hold that the foregoing considerations render violent crime in parking structures foreseeable as a matter of law, either in general or in the particular garage at issue.

Unlike the instant case, *Gomez* involved a garage patron who was shot when he inadvertently interrupted a robbery occurring in an underground garage. There was no indication in *Gomez* that any crime had been committed in the garage previously, but there was evidence of at least 16 acts of theft and vandalism in the building above the garage. (145 Cal.App.3d at p. 628.) In light of that evidence, the *Gomez* court concluded that a jury could find that acts of theft and vandalism were foreseeable in the parking structure and that a patron who interrupted an act of theft or vandalism while returning to a parked car would be subject to violent attack by the thief or vandal. (*Ibid.*) The court found it insignificant that the patron there had interrupted a robbery, rather than an act of theft or vandalism, since "the fatal incident fell within the scope of the alleged foreseeable harm, i.e., attack on a patron who interrupts a criminal act." (145 Cal.App.3d at p. 628, fn. 1.)

To buttress its conclusion regarding foreseeability of the incident, the *Gomez* court added: "[I]n its very operation of a parking structure, defendant may be said to have created 'an especial temptation and opportunity for

criminal misconduct,' thus increasing the foreseeability of the attack. (Prosser, Torts (4th ed.1971) p. 174.) In making this observation we note the unique nature of a parking complex, which invites acts of theft and vandalism. In such structures, numerous tempting targets (car stereos, car contents, the cars themselves) are displayed for the thief; high walls, low ceilings and the absence of the cars' owners allow the thief or vandal to work in privacy and give him time to complete his task. Such circumstances increase the likelihood of criminal misconduct. In addition, the deserted, labyrinthine nature of these structures, especially at night, makes them likely places for robbers and rapists to lie in wait. Robbery, rape, and violent consequences to anyone who interrupts these crimes, may thus also be foreseeable." (*Gomez, supra,* 145 Cal.App.3d at p. 628.)

As a preliminary matter, we observe *Gomez* erred in holding that foreseeability, when analyzed to determine the existence or scope of a duty, is a question of fact for the jury. (Compare *Gomez, supra,* 145 Cal.App.3d at p. 628 with *Ann M., supra,* 6 Cal.4th at p. 678.) More significantly, *Gomez,* upon close review, fails to persuade us that rapists and robbers are more likely to lie in wait in underground parking structures than elsewhere or that the operation of an underground parking structure creates " 'an *especial* temptation and opportunity' " for sexual assaults and other crimes of a violent nature.[4] (See *Gomez, supra,* 145 Cal.App.3d at p. 628, italics added.)

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[4] As indicated, *Gomez* credited Prosser on Torts for the "especial temptation" phrase. (*Gomez, supra,* 145 Cal.App.3d at p. 628, quoting Prosser, Torts (4th ed.1971) p. 174.) The phrase also appears in the latest edition of Prosser and Keeton on Torts.

In *Ann M.*, we acknowledged the unfortunate circumstance that "[i]t is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable." (*Ann M., supra*, 6 Cal.4th at p. 678.) Not only is random, violent crime "endemic in today's society" (*Ibid.*), but one can easily think of a host of locations and businesses that, for one reason or another, present attractive opportunities to the criminal element of society. As one commentator has observed: "Because all businesses attract crime to some extent, they could all be characterized as 'inherently dangerous.' At various times, courts have described parking facilities, all-night laundromats, emergency room facilities, banks, and college dormitories as being facilities that attract crime. The mere fact that a crime has occurred almost always allows one to draw the conclusion, after the fact, that the premises were inherently dangerous.

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(Prosser & Keeton, Torts (5th ed.1984) § 33, p. 201.) Neither treatise posits that certain types of premises create an especial temptation and opportunity for criminal misconduct, but the more recent treatise cites two cases in which the particular conduct of the defendant did so. (*Id.* at p. 201, fn. 86.) One involved a vehicular death caused by an intoxicated driver after the police had detained the driver but then negligently permitted him to remain in his car with the keys in the ignition. (*Green v. City of Livermore* (1981) 117 Cal.App.3d 82.) The other involved deaths from a bomb made by thieves with dynamite that the defendant had negligently stored. (*Bridges v. Kentucky Stone Co., Inc.* (Ind.Ct.App.) 408 N.E.2d 575, vacated (Ind.1981) 425 N.E.2d 125.) Of those few cases involving parking lots or garages that are cited in the discussions accompanying the "especial temptation" phrase, none holds that such premises are inherently dangerous.

Moreover, any duty premised on the idea that the business attracts crime ignores the fact that many such businesses are economically viable precisely because they do not require any on-site labor. Once proprietors are forced to provide security guards at all-night laundromats or at bank teller machines, those operations cease to become profitable. It serves no one to impose a duty which, rather than protecting customers, forces the businesses which they frequent to close." (Kaufman, *When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises* (1990) 31 S. Tex. L.Rev. 89, 112-113, fns. omitted.) Were we to find that the occurrence of violent crime in commercial underground parking structures is highly foreseeable as a matter of law, we would be opening the door to virtually limitless litigation over what other types of property could also be characterized as "inherently dangerous."

Moreover, while *Gomez* recognized that violent crime *might* be foreseeable in underground parking structures, it implicitly rejected the notion that such structures are so inherently dangerous that security guards are required to safeguard their users. Indeed, the *Gomez* court held that, at most, the garage owner there would have been required to take what it viewed as "minimal precautions" against crime, i.e., maintaining operational security monitors and intercoms. (*Gomez, supra,* 145 Cal.App.3d at pp. 632-633.)

Finally, adoption of the view that violent crime in underground parking structures is highly foreseeable as a matter of law would lead to incongruous results. In the present case, for instance, the record reflects that the underground tenant garage had no reported incidents of

crime for 10 years prior to the assault upon plaintiff. The only evidence of prior criminal acts on the premises consisted of the seven bank robberies on the street level of the office building located above the parking structure. As already discussed, application of *Ann M.*'s analysis to this record leads to the conclusion that defendants' duty of care did not include the hiring of security guards for the garage because the bank robberies were not sufficiently similar to the sexual assault crime to establish a high degree of foreseeability. Nor would such a duty be found if the assault on plaintiff had occurred in other areas of the office building instead of the garage (e.g., in a common hallway or at plaintiff's place of business).

Yet, under the rule advocated by plaintiff, defendants would be saddled with the significant burden of hiring security guards to patrol the underground garage simply because it is an underground garage, without regard to the dissimilarity of the prior criminal incidents elsewhere on the premises or to the garage's 10-year history of crime-free existence. Indeed, such a rule would burden virtually all owners of underground commercial garages in contravention of settled state policy that they, as landlords, should not be forced to become the insurers of public safety. (See *Ann M., supra,* 6 Cal.4th at p. 679.)

**B. Other Security Measures**

In *Ann M.*, we reaffirmed our commitment to the principle that the scope of a landowner's duty to provide protection against third party crime is determined in part by balancing the foreseeability of the harm against the burden to be imposed. (6 Cal.4th at p. 678.) We explained:

" ' "[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." [Citation.]' Or, as one appellate court has accurately explained, duty in such circumstances is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures. (*Gomez v. Ticor, supra,* 145 Cal.App.3d at p. 631.)" (*Ann M., supra,* 6 Cal.4th at pp. 678-679.)

Plaintiff relies on the foregoing passage to argue that, even if defendants were not required to hire security guards because a high degree of foreseeability cannot be established, the occurrence of violent third party crime in underground garages is sufficiently foreseeable that defendants were required to provide protection by simple and less burdensome means. According to plaintiff, defendants were under a "minimal obligation" to keep the tenant garage brightly lit and clean, to hook up a previously installed security camera located over the elevator of the garage, and to require existing personnel to periodically walk through the garage. Plaintiff's reasoning is flawed.

In the first place, it is questionable whether plaintiff's proposed measures would have been effective to protect against the type of violent assault that occurred here. The record, for instance, contains no evidence that the security camera at issue was even aimed toward the area of the parking garage where plaintiff was attacked. Moreover, surveillance cameras do not deter all crime and

criminals do not confine their activities to locations that are untidy or unkempt.

It is also questionable whether the identified measures would have been any less burdensome than the hiring of security guards. As defendants correctly point out, surveillance cameras may be ineffectual to protect against crime unless there are employees who are available to continuously monitor video transmissions and respond effectively when suspicious or criminal behavior is observed. Similarly, plaintiff's contention that garage owners and operators have a "minimal obligation" to arrange periodic walk-throughs of the garage by existing personnel assumes that they have workers readily available who are trained to deal with violent crime. But even if such employees are available and higher monetary costs are not implicated, a requirement that owners and operators of commercial underground garages provide "adequate" security monitoring through existing personnel would be vague and impossible to define, especially where, as here, a particular garage has been free of crime for a substantial period of time and there is no evidence that garage users ever raised the issue of personal safety with the owner or the operator.

In addition, a number of courts have criticized the view that "adequate lighting" is a simple and well-defined security measure that is effective in preventing crime-related injuries. (E.g., *7735 Hollywood Blvd. Venture v. Superior Court, supra,* 116 Cal.App.3d at p. 905 [noting the vagueness of a duty to provide adequate lighting]; *Kwaitkowski v. Superior Trading Co., supra,* 123 Cal.App.3d at p. 333 [agreeing that the utility of a light as a security measure is questionable]; cf. *Gomez, supra,* 145

Cal.App.3d at p. 632 [suggesting that, unlike operational security monitors and intercoms, light bulbs may have no appreciable effect in preventing or warning of crimes].) Other courts, moreover, have rejected claims of abstract negligence pertaining to the lighting and maintenance of property where no connection to the alleged injuries was shown.[5] (E.g., *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 435-439 [even if defendant owed a duty of protection, lighting and untrimmed foliage and trees did not proximately cause plaintiff's injury where there was no evidence that her attacker hid in the shadows or behind a tree or bush]; *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 211-212 [lighting was not a proximate cause of plaintiff's injury because she saw her attacker standing in the light and staring at her prior to the attack]; *Noble v. Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912, 915-916 [even assuming a duty to protect, plaintiffs must prove more than abstract negligence unconnected to the injury].)

Setting aside concerns regarding the efficacy and burden of plaintiff's proposed security measures and questions regarding the issue of proximate cause, the record remains deficient in establishing the foreseeability of violent attacks such as the one against plaintiff. Viewing the record in the light most favorable to plaintiff, it shows

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[5] In this case, plaintiff contends that inadequate lighting in the tenant garage resulted in several darkened areas that provided hiding places and vantage points from which her attacker could have been lying in wait for a victim like her to arrive. The record, however, contains no evidence that her attacker actually used any of the darkened areas to facilitate his assault.

that robbers repeatedly targeted a bank on the ground floor of the subject premises in the 27-month period preceding the sexual assault. Apart from those incidents, there is no evidence of other prior crimes against property or persons on the premises, either in the office building or in the underground parking garage. Since sexual assault is not a reasonably foreseeable risk associated with bank robberies (see *People v. Nguyen* (1993) 21 Cal.App.4th 518, 533 [observing that rapes consummated during the robbery of a bank appear to be a rarity]), the bank robberies did not portend the vicious assault committed upon plaintiff.

Two decisions, *Cohen v. Southland Corp.* (1984) 157 Cal.App.3d 130 (*Cohen*) and *Gomez, supra,* 145 Cal.App.3d 622, support a somewhat broader concept of foreseeability with regard to assaults occurring on properties that have some history of nonassaultive crime. In those cases, the courts indicated it would be reasonable to anticipate that a person would be subject to violent attack if he or she were to be present at an otherwise foreseeable crime on the premises or if he or she were to interrupt such a crime in progress.[6] Thus, they reasoned, violent assaults that occur in such a manner may be sufficiently foreseeable to require the taking of "minimal" security measures even though the subject premises had never before experienced an assault or injury-producing crime.

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[6] We accept, for purposes of argument, *Gomez* 's apparent conclusion that a crime of robbery may be foreseeable in a parking structure when at least 16 crimes of theft or vandalism have occurred on the premises in the office building above the structure. (See *Gomez, supra,* 145 Cal.App.3d at p. 628.)

(*Cohen, supra,* 157 Cal.App.3d at pp. 139-140, 142-143; *Gomez, supra,* 145 Cal.App.3d at p. 628.) Here, of course, plaintiff offered no evidence suggesting that her attack had any connection to an otherwise foreseeable crime on the premises (i.e., bank robbery). Accordingly, the incident falls outside even the broader scope of reasonable foreseeability contemplated in *Cohen* and *Gomez*.

Finally, the police department records of crimes occurring in the 50 square blocks surrounding the parking garage do not aid plaintiff's case. On this point, we note that *Ann M.* left open the possibility that violent crime may be foreseeable on a business property in the absence of prior similar incidents if violent crimes previously occurred on the premises of a substantially similar business establishment in its immediate proximity. (*Ann M., supra,* 6 Cal.4th at p. 679, fn. 7.) But the evidence provided here contains no information regarding the location of any of the reported crimes within the identified sector and no indication of their proximity to the garage. Nor has plaintiff shown that defendants were aware of the police department statistics. In short, such evidence provides no tenable basis for establishing foreseeability.[7]

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[7] The record in this case differs substantially from that in *Clohesy v. Food Circus Supermarkets, Inc.* (N.J.1997) 149 N.J. 694 A.2d 1017 (*Clohesy*), a case in which the New Jersey Supreme Court held it was reasonably foreseeable that a customer of a large supermarket could suffer some injury in its parking lot such that the supermarket owner had a legal duty to provide reasonable security in the lot. In contrast to the situation here, the record in *Clohesy* contained evidence of approximately 60 criminal incidents either on or in close proximity to the

We have not overlooked the fact that *Frances T. v. Village Green Owners Assn., supra,* 42 Cal.3d 490, *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, and *Slapin v. Los Angeles International Airport* (1976) 65 Cal.App.3d 484, allowed victims of violent crime to maintain tort actions premised upon theories of insufficient lighting or maintenance of property. Those decisions, however, were all decided in the context of demurrers to complaints containing allegations, which, if proved true, would establish the foreseeability of crime on the premises. (*Frances T. v. Village Green Owners Assn., supra,* 42 Cal.3d at p. 503 [rape victim's complaint alleged facts demonstrating the defendant's knowledge that crimes were being committed against condominium residents, that the plaintiff's unit had been recently burglarized, and that additional lighting in the common areas was needed and could aid in deterring criminal conduct, especially break-ins of units]; *Peterson v. San Francisco Community College Dist., supra,* 36 Cal.3d at pp. 814-815 [victim of an attempted rape on a community

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supermarket's premises over the 2 1/2-year period that preceded the deceased customer's kidnapping and murder in 1991. (694 A.2d at p. 1021.) The offenses consisted of thirty shopliftings, twelve thefts either inside the store or in the parking lot, four driving while intoxicated offenses, four disorderly conduct offenses, four assaults, one criminal mischief, one trespassing, and one possession of a controlled dangerous substance. (*Ibid.*) In addition, the record reflected a significant increase in the incidents occurring on the supermarket's premises (four in 1989; seven in 1990; thirteen in 1991). (*Ibid.*) In light of the obvious dissimilarities, we do not view *Clohesy* as supporting a finding of foreseeability here.

college campus was entitled to pursue action under Government Code section 835 and to prove that the defendant's failure to warn, trim foliage, or take other reasonable protective measures was the proximate cause of her injuries in light of specific allegations that the defendant was aware that prior similar assaults had occurred in the same location]; *Slapin v. Los Angeles International Airport, supra,* 65 Cal.App.3d at p. 489 [clarifying, in the context of an action under Government Code section 835, that the question whether the alleged dangerous condition caused by insufficient lighting created a reasonably foreseeable risk of injury would hinge the plaintiffs' ability "to establish a history of crime at the parking lot"]; see also *Penner v. Falk* (1984) 153 Cal.App.3d 858, 866-867 [complaint sufficiently alleged landlord's awareness of violent crime on the premises].) By contrast, this case comes to us on a motion for summary judgment and plaintiff has presented her proof. That proof, we conclude, is insufficient to establish foreseeability.

It is difficult to quarrel with the abstract proposition that the provision of improved lighting and maintenance, operational surveillance cameras and periodic walk-throughs of the tenant garage owned and operated by defendants might have diminished the risk of criminal attacks occurring in the garage. But absent any prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location, we cannot conclude defendants were required to secure the area against such crime.

## DISPOSITION

The contrary judgment of the Court of Appeal is reversed and the matter is remanded to that court with directions to enter judgment in favor of defendants.

**BAXTER, J.**

**WE CONCUR:**

**GEORGE, C.J.**
**KENNARD, J.**
**CHIN, J.**
**BROWN, J.**

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**COPY**

**SHARON P. v. ARMAN, LTD., et al.**

*S063612*

## CONCURRING AND DISSENTING OPINION BY WERDEGAR, J.

Like the majority, I fully embrace the proposition that "the provision of improved lighting and maintenance, operational surveillance cameras and periodic walk-throughs of the tenant garage owned and operated by defendants might have diminished the risk of criminal attacks occurring in the garage." (Maj. opn., *ante*, at p. 22.) Such measures, or others that might readily be imagined, such as strategically placed intercoms or security alarms, clearly would enhance any garage user's sense of personal safety and security when parking his or her car and traversing the facility to an exit.

Notwithstanding the above, a landlord has no absolute duty, in the abstract, to take some or all such measures; rather, a landlord's "duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 *Ann M.*), citing *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 501.) As we stated in *Ann M.*, "In this, as in other areas of tort law, foreseeability is a crucial factor in determining the existence of duty." (6 Cal.4th at p. 676, citing *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 123 (*Isaacs*); *Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 506.) Foreseeability, as regards duty, rests on more than the mere possibility that taking any one or a combination of assorted measures *might* diminish the risk of criminal attacks. Rather, "duty in such circumstances is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." (*Ann M., supra,* at p. 679, citing *Gomez v. Ticor* (1983) 145 Cal.App.3d 622, 631.)

Consequently, I believe the majority correctly adheres to the test set forth in *Ann M.*, when it states that, "absent any prior similar incidents *or other indications* of a reasonably foreseeable risk of violent criminal assaults in that location, we cannot conclude defendants were required to secure the area against such crime." (Maj. opn., *ante,* at p. 22, italics added; see *Ann M., supra,* 6 Cal.4th at p. 679 & fn. 7.)

In the instant case, the record fails to show not only any prior similar incidents; it fails as well to show any

"other indications of a reasonably foreseeable risk of violent criminal assaults" in the garage. The only criminal activity in close proximity to the garage consisted of seven robberies, over a period of two years, in a bank above ground and at some distance from the parking garage entrance. The possibility of a robbery in a bank does not raise the possibility of a rape in a distant, or even a nearby, garage.

Significantly, before this incident the garage had been crime free for more than 10 years. The garage was frequented, moreover, not by the occasional patron, but by regular customers who were tenants in the office building above. Plaintiff and her counsel assert the garage showed signs of neglect, yet, whatever the degree of neglect in its maintenance, such was insufficient, insofar as the record discloses, to cause the tenants – likely repeat, even daily, users of the facility – in the interests of their personal safety or sense of security, to complain to the owner or operator about any perceived risk of harm or deterioration in the condition of the premises. Given, therefore, the lack of any prior similar incidents, the lack of any expressed concern by regular users of the garage, and the lack of *any other indications* of a reasonably foreseeable risk of violent criminal assaults, either on the premises or in reasonable proximity thereto, I agree the landlord here did not have a legal duty to take precautions against such criminal activity.

I therefore concur in the majority's reversal of the judgment below.

I dissent, however, from the majority opinion to the extent its exaggerated emphasis on, and separate

treatment of, security guards, a measure the majority acknowledges plaintiff "is not asking for" (see maj. opn., *ante*, at p. 6), may be read analytically to distinguish the question whether a landlord is obligated to provide such guards from the question of scope of duty, generally. There is no such analytical distinction. The scope of a landlord's duty "to take reasonable steps to secure common areas against foreseeable criminal acts of third parties" (*Ann M., supra*, 6 Cal.4th at p. 674) depends on the circumstances and, as previously noted, "is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures" (*id.* at p. 679). In *Ann M.*, in a context where the plaintiff contended security patrols were the "first line of defense" the landlord owed (*id.* at p. 673), we determined a high degree of foreseeability was required to find the provision of security guards to be within the scope of the landlord's duty. In so doing, we "revisit[ed]" and "refin[ed]" *Isaacs, supra*, 38 Cal.3d 112, which had determined that prior similar incidents were relevant, but not essential, to the existence of such a duty. We did not, however, thereby create a special form of duty analysis for such claims. Both "before and after our decision in *Isaacs*, we have recognized that the scope of the duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed." (*Ann M., supra*, at p. 678.)

I further dissent insofar as the majority opinion may be read impliedly to reinstitute a pure prior similar incidents rule such as we demonstrated in *Isaacs* is "fatally flawed in numerous respects." (*Isaacs, supra*, 38 Cal.3d at p.125; see generally, *id.* at pp. 125-126.) As the majority

acknowledges, we have "left open the possibility that violent crime may be foreseeable on a business property in the absence of prior similar incidents if violent crimes previously occurred on the premises of a substantially similar business establishment in its immediate proximity" (maj. opn., *ante*, at p. 20, citing *Ann M., supra*, 6 Cal.4th at p. 679, fn. 7) or where there are "other indications of a reasonably foreseeable risk of violent criminal assaults in that location" (maj. opn., *ante*, at p. 22). In this case, therefore, the absence of prior incidents similar to the attack on plaintiff is relevant, but not dispositive, and the majority's conclusion "that defendants' duty of care did not include the hiring of security guards for the garage because the bank robberies were not sufficiently similar to the sexual assault crime to establish a high degree of foreseeability" (maj. opn., *ante*, at p. 15) is correct, but only because the record discloses no "other [legally sufficient] indications of a reasonably foreseeable risk of violent criminal assaults in that location" (*id.* at p. 22).[1]

Emphatically, a landlord is not, as the prior similar incidents rule would have it, entitled to one free assault before the failure to take appropriate security measures subjects him or her to the risk of civil liability.

WERDEGAR, J.

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[1] I agree with the majority that plaintiff's proffered proof in this case – police department records of crimes during the previous 15 months in the 50 square blocks surrounding the garage (recording 2 rapes out of 363 crimes) – does not provide a tenable basis for establishing foreseeability. (Maj. opn., *ante*, at pp. 3, 20.)

**COPY**

**SHARON P. v. ARMAN, LTD., ET AL.**
*S063612*

## DISSENTING OPINION BY MOSK, J.

I dissent. To hold that the operator of *this* underground garage, with its alleged hiding places, missing lights, broken security cameras, absence of supervision, and other evidence of neglect, lacked any duty as a matter of law to maintain the premises in a fit and safe condition for business so as not to attract crime – and implicitly that any garage operator lacks such a duty – defies logic. And the result is demonstrably unjust.

### I

Sharon P. alleged that she was sexually assaulted in an underground parking garage. She claimed in essence that the garage's dilapidation attracted her assailant. The trial court ruled that plaintiff was not owed a duty of care and entered summary judgment for defendants. It reasoned that the crime was not sufficiently foreseeable to give rise to a duty of care.

### A

To recover for the consequences of another's purportedly wrongful action, the victim must show that the tortfeasor owed a duty of care, that it breached its duty, that the breach proximately caused the harm, and that the victim is entitled to money damages as a result. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 614.) This is the bedrock of negligence law. Of these elements, ordinarily

only duty is a question of law to be resolved by a court.[1] Thus, we routinely say that the existence of a duty is a legal question. (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) The requirement of duty gives courts the ability to limit liability for reasons of social policy (e.g., *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933), lest the theoretically infinite reach of tort liability paralyze society with a rule that any action eventually leading to harm, no matter how remotely, is actionable. Thus, an actor has no legal duty to avoid unforeseeable harm. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678.)

In this case, however, the majority wrongly decide that defendants had no duty to maintain the premises so as not to guard against attacks on people therein. That is utterly contrary to settled legal principles. Civil Code section 1714 provides in relevant part: "Every one is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property. . . . " Thus, "California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M., supra*, 6 Cal.4th 666, 674.) This obligation "includes a 'duty to take affirmative action to control [i.e., guard against] the wrongful acts of third persons which threaten invitees where the occupant

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[1] Whether defendants *breached* their duty is a question of fact for the jury to decide. (*Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617, 633.) So are the questions whether defendants' conduct proximately caused plaintiff's injuries (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 520), and the amount of compensation owed for them (*Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 53).

has reasonable cause to anticipate [i.e., foresee] such acts and the probability of injury resulting therefrom.' " (*Kentucky Fried Chicken, supra,* 14 Cal.4th 814, 819.) In turn, " 'foreseeability . . . includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' . . . Moreover, it is settled that what is required to be foreseeable is the general character of the event or harm . . . [and] not its precise nature or manner of occurrence." (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58.)

As pertinent to a case such as this, in which a victim sues the possessor of land for a crime committed against her by a third party, "duty . . . is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." (*Ann M., supra,* 6 Cal.4th 666, 679.) Applying *Ann M.*'s balancing test, one observes that a land possessor's neglect of its property may increase the foreseeability of third party criminal conduct, and thus create a duty to ameliorate any dilapidation or deterioration that invites violent crime. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 129; cf. *Ann M., supra,* 6 Cal.4th 666, 677-679 & fns. 6 & 7.)[2] Foreseeability

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[2] In *Isaacs* we held that whether a reasonable land possessor would have foreseen the possibility of criminal conduct depends on the following factors, among others: "the nature, condition and location of the defendant's premises." (*Isaacs, supra,* 38 Cal.3d 112, 129.) *Ann M.* expressed doubt about a totality of the circumstances test contained in *Isaacs,* but did not overrule *Isaacs* in this regard; indeed, *Ann M.* noted that under circumstances similar to those Sharon P. alleges here, a

increases, as does the burden imposed on the land possessor to guard against third parties' criminal acts, to the extent that those three factors were present and would notify a reasonable land possessor of the potential that its invitees could be injured.

This case comes before us on summary judgment. As is well known, a summary judgment motion is properly granted if the moving party meets the burden of showing that there are no triable issues of fact and that it is entitled to judgment as a matter of law. (*Artiglio v. Corning, Inc., supra,* 18 Cal.4th 604, 612.) Thus if, but only if, the land possessor meets the burden of showing that, *as a matter of law,* the character of the property and the history of crime on the property and in the vicinity, viewed in the aggregate, would not give notice to a reasonable land possessor of the potential for harm to its invitees, is the summary judgment motion properly granted.

The foregoing burden, of course, is and should be difficult to meet. Summary judgment is not "a substitute for a full trial." (*Hayman v. Block* (1986) 176 Cal.App.3d 629, 639.) "The purpose of the summary judgment procedure is not to try the issues but merely to discover, through the medium of affidavits, whether there are issues to be tried and whether the parties possess evidence which demands the analysis of trial." (*Colvin v. City of Gardena* (1992) 11 Cal.App.4th 1270, 1275.) Especially in a factually complex case such as this, the parties

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plaintiff might establish a high degree of foreseeability. (*Ann M., supra,* 6 Cal.4th 666, 679, fn. 7.)

cannot be expected to present all of their evidence in the form of affidavits.

Applying the principles outlined above to the alleged facts of this case, it is clear that granting the summary judgment motion was improper. It was for a jury to evaluate the conflicting evidence and determine whether, under all of the circumstances, defendants knew of or should have anticipated the possibility of criminal conduct in their parking garage, and failed to guard against it or even invited it by letting the premises deteriorate.

But the notion that there are limits to the limits on tort liability that courts may impose is absent from the majority's analysis. They impose an iron rule of no potential liability despite plaintiff's strong evidence of neglected and unsupervised property. They err.[3]

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[3] Nothing in *Ann M., supra*, 6 Cal.4th 666, is to the contrary. The question presented in Ann M. was narrow: whether a shopping center had a duty, despite a lack of knowledge of prior incidents of violent crime, to provide security guards to protect a tenant's employee – or as stated in *Ann M.*'s own language, whether it "had reasonable cause to anticipate that criminal conduct such as rape would occur in the shopping center premises unless it provided security patrols in the common areas." (*Id.* at p. 676.) We concluded that because of the high cost of security guards and the difficulty of knowing how many might be needed, "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards." (*Id.* at p. 679.) The "requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (*Ibid.*)

But that is the extent of *Ann M.* As the Court of Appeal herein explained, "*Ann M.* did not totally rewrite *Isaacs* on the

B

The majority rest their decision on the principle of unforeseeability. But their reasoning is difficult to understand, and I believe they confuse the two different ways in which foreseeability is applied. To be sure, "[t]he problem is complex, and has bedeviled many." (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1030.) The majority may now count themselves among them.

The majority contend that foreseeability, when used as a component of determining a defendant's duty, is a matter of law for the court to decide. That is correct, but it is a rule of limited application. All it means is that, as a general matter, if the type of harm alleged is too remote a consequence of the type of misconduct alleged, the defendant is not liable. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.) It is much the same as saying that the conduct, as a matter of law, was not the proximate cause of the harm. But there is no question of such remoteness here. It is for the jury to decide whether, under the facts of this case, the harm to Sharon P. was a foreseeable consequence of defendants' conduct.

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issue of prior similar incidents, but only addressed that issue vis-a-vis the claimed necessity of a specific preventative measure: security guards." (Italics deleted.) What *Ann M.* does require is what *Isaacs v. Huntington Memorial Hospital, supra,* 38 Cal.3d 112, required: as stated, "a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." (*Ann M., supra,* 6 Cal.4th 666, 679; cf. *Isaacs, supra,* 38 Cal.3d 112, 125, 131.) A court engages in that balancing test in determining the scope of the land possessor's duty. (*Ann M., supra,* 6 Cal.4th at pp. 678-679.)

The majority appear not to perceive the distinction, but they need look no further than *Ballard v. Uribe, supra,* 41 Cal.3d 564. *Brewer v. Teano, supra,* 40 Cal.App.4th 1024, usefully summarized *Ballard*'s holding. *Ballard* "acknowledged the confusion that had arisen over the respective roles played by the court and jury in dealing with the foreseeability concept in tort doctrine. In some contexts it is a question of fact for the jury, and in others a 'part of the calculus to which a court looks in defining the boundaries of "duty." ' ' "[D]uty" is not an immutable fact of nature, " ' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " ' The foreseeability of a particular kind of harm is significant in the duty calculus, 'but a court's task – in determining "duty" – is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' By contrast, the jury considers foreseeability in two more focused, fact-specific settings: likelihood or foreseeability of injury in deciding whether defendant's conduct was negligent in the first place, and whether the negligence was a proximate or legal cause of plaintiff's injury." (*Id.* at p. 1030.)

C

Today's decision illustrates the impossibility of evaluating complex factual matters in the pages of the appellate reports. If the question of legal duty must not be "left

to the jury," lest "the court . . . abdicat[e] decision in favor of men who do not know the law" (Prosser, *Proximate Cause in California* (1950) 38 Cal.L.Rev. 369, 423), so the questions of proximate cause and foreseeability in the fact-specific context of this case must not be left to a reviewing court that, in the absence of a full trial, cannot and does not know all of the relevant facts.

II

I also disagree with the majority's unsupported comments about crime and public safety.

Apparently addressing the question of proximate cause, the majority announce that "it is questionable whether plaintiff's proposed measures would have been effective to protect against the type of violent assault that occurred here. The record, for instance, contains no evidence that the security camera at issue was even aimed toward the area of the parking garage where plaintiff was attacked. Moreover, surveillance cameras do not deter all crime and criminals do not confine their activities to locations that are untidy or unkempt." (Maj. opn., *ante*, at p. 17.)

Of course surveillance cameras do not deter *all* crime. One question to be resolved at trial is the extent to which they would have on defendants' premises. And of course criminals do not confine their conduct *entirely* to neglected, dank, dark, gloomy and unmonitored underground parking structures. Crime may occur in unlikely places: in 1982 an intruder awakened Queen Elizabeth II in her bedroom at Buckingham Palace. The question, ultimately, is whether the environment in which plaintiff

was assaulted invited crime in a way that entitles her to damages. These are questions of fact for a jury to resolve.

Casual theorizing and straw-figure demolition pervade the majority's discussion. The majority speculate that "surveillance cameras may be ineffectual to protect against crime unless there are employees who are available to continuously monitor video transmissions and respond effectively when suspicious or criminal behavior is observed." (Maj. opn., *ante,* at p. 17.) They also, with notable lack of persuasiveness, question the efficacy of good lighting. (*Id.* at p. 18.) But at a trial, there might be testimony on such questions. That trial will not occur now.

One item of the majority's social commentary is almost certainly incorrect. They justify their decision to excuse defendants in part by announcing that "violent crime [is] 'endemic in today's society.' " (Maj. opn., *ante,* at p. 15.) The strange implication is that ever higher crime rates justify a new legal rule. But empirical data belie the majority's observation: violent crime has declined to the levels of decades ago. "National Crime Victimization Survey [1998] violent crime rates . . . are the lowest recorded since the survey's inception in 1973."[4] And "the 1991 peak in the homicide rate was lower than the 1980 crest and even close to par with trends during the Great

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[4] Criminal Victimization 1998, Bureau of Justice Statistics, United States Department of Justice (Aug. 25, 1999 online ed.), available at <http://www.ojp.usdoj.gov/bjs/cvictgen.htm> as of September 21, 1999.

Depression. Moreover, since 1991, the murder rate has regressed to levels not seen since the 1960s."[5]

Moreover, the majority's crime prevalance analysis is illogical. If crime is endemic in a particular area, then the duty to protect against it is heightened, not diminished. The relevant question in this regard is whether defendants' garage was located in an area sufficiently prone to certain crimes so as to make a potential attack on an invitee foreseeable. If so, that fact, regardless of statistics, would call for defendants to provide more protection to their invitees, not less. To repeat, " 'foreseeability . . . includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' " (*Bigbee v. Pacific Tel. & Tel. Co., supra,* 34 Cal.3d 49, 57.)

III

The Court of Appeal declared that this case presented the question whether underground "commercial parking garages can be fairly characterized as inherently dangerous" for attracting "the criminal acts of third persons." It held that they could be so characterized.

In reversing the trial court's grant of summary judgment, the Court of Appeal found two factors significant. The first was narrow and, though it led that court to a legal conclusion, was fact specific. Sharon P. alleged that

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[5] Fox, *Nature and distribution of known offenses,* Sourcebook of Criminal Justice Statistics (1998 online ed.) available at <http:// www.albany.edu/sourcebook/1995/sec3intro.html> as of September 21, 1999.

defendants had neglected the property and it was located in a high-crime area. "[T]aking into account the physical conditions presented at this particular location as well as its recent history of criminal activity, including at least seven serious felonies (robberies) at the adjacent bank premises during the two-year period preceding the assault on plaintiff, we hold, as a matter of law, that a high degree of foreseeability existed that patrons of the defendants' commercial parking garage might become victims of third person criminal assaults, such as robberies, shootings, rapes, or some other form of physical aggression. We necessarily further hold that, given all of such circumstances, specific evidence of prior similar criminal misconduct is not required in order for the defendants to have a duty to provide reasonable preventative measures which, depending on the total circumstances, might or might not include security guards."

The second factor in the Court of Appeal's analysis was purely legal: it held that as a matter of law underground parking garages, by their nature, invite crime. " '[I]n its very operation of a parking structure, defendant may be said to have created "an especial temptation and opportunity for criminal misconduct," thus increasing the foreseeability of the attack. [Citation.] In making this observation, we note the unique nature of a parking complex, which invites acts of theft and vandalism. In such structures, numerous tempting targets (car stereos, car contents, the cars themselves) are displayed for the thief; high walls, low ceilings and the absence of the cars' owners allow the thief or vandal to work in privacy and give him time to complete his task. Such circumstances

increase the likelihood of criminal misconduct. In addition, the deserted, labyrinthine nature of these structures, especially at night, makes them likely places for robbers and rapists to lie in wait. Robbery, rape, and violent consequences to anyone who interrupts these crimes, may thus also be foreseeable.' " The Court of Appeal was quoting *Gomez v. Ticor* (1983) 145 Cal.App.3d 622, 628, invoking language that we also quoted approvingly in *Isaacs v. Huntington Memorial Hospital, supra,* 38 Cal.3d 112, 128.

These conclusions were, in my view, erroneous. The first conclusion was incorrect for the same reason that the majority err: the Court of Appeal decided as a matter of law a question of foreseeability that was for the jury, but decided it to the contrary. The second conclusion, that subsurface parking garages are inherently dangerous, was also erroneous. In fact some such parking garages, because they provide the security their location requires, are not dangerous. But the Court of Appeal cannot be faulted for having addressed the issue. It was inevitable that a reviewing court would do so after we queried in an aside in *Ann M., supra,* 6 Cal.4th 666, "whether some types of commercial property are so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner's duty of care." (*Id.* at p. 680, fn. 8.) We suggested that parking garages were inherently dangerous, observing that *Ann M.* had "offered no evidence to show that, like a parking garage or an all-night convenience store, a retail store located in a shopping center creates ' "an especial temptation and opportunity for criminal conduct." ' " (*Ibid.*) The Court of Appeal noted,

"Although the [*Ann M.*] court phrased the question only in terms of a duty to provide security guards, the basic issue it left unresolved is whether certain types of commercial premises may be so inherently dangerous as to present a reasonable foreseeability that crimes against customers or tenants will be committed by third persons if the landowner does not take reasonable preventative measures which may or may not include security guards."

But the majority have responded to the questionable aspects of the Court of Appeal majority's analysis with their own errors. I disagree with the reasoning both of the majority on this court and that on the Court of Appeal.

IV

I would affirm the judgment of the Court of Appeal, but on the grounds stated herein.

MOSK, J.

*CERTIFIED FOR PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

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| SHARON P., Plaintiff and Appellant, v. ARMAN, LTD., ET AL., Defendants and Respondents. | B094739 (Super. Ct. No. SC029060) (Filed Jul. 8, 1997) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Neidorf, Judge. Reversed.

Peter B. O'Brien and Kelly L. Duenckel for Plaintiff and Appellant.

Early, Maslach, Price & Baukol, Larry E. Robinson, Greines, Martin, Stein & Richland, Marc J. Poster, Robert A. Olson, Acker, Kowalick & Whipple, Stephen Acker and A. Gina Hogtanian for Defendants and Respondents.

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In this case, we deal with an issue left unresolved by the Supreme Court in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, to wit, the extent to which commercial parking garages can be fairly characterized as inherently dangerous, and the impact which that circumstance has on the duty of the owners and operators

thereof to take reasonable precautions to protect users from the criminal acts of third persons.

Plaintiff Sharon P. appeals from a summary judgment granted to defendants Arman, Ltd. and APCOA, Inc. ("Arman," "Apcoa," collectively "defendants"). Plaintiff filed this suit after she was attacked and sexually assaulted at gunpoint in a subterranean parking garage in the commercial office building where she worked. The building and garage are owned by Arman and the garage is managed by Apcoa. The summary judgment was based on the trial court's determination that defendants owed no duty of care to plaintiff. After reviewing plaintiff's evidence of various crimes in the surrounding neighborhood, including a number of robberies in the bank located above the parking garage, the court determined that such evidence was "not sufficient to raise a triable issue of fact in that it does not establish the degree of foreseeability necessary to impose upon the defendants a duty to the plaintiff." For the reasons set forth in this opinion, the trial court's conclusion reflected an incorrect analysis and application of relevant case law.

We conclude defendants did owe a duty of care to plaintiff to provide reasonable security measures in the commercial parking garage which was owned and operated by them and in which plaintiff was attacked. Whether the manner in which they operated and maintained that garage constituted a breach of that duty and, if so, whether such breach was a legal cause of the damages suffered by plaintiff, are issues which must be addressed upon remand. We therefore reverse the judgment and remand for further proceedings consistent with the views expressed herein.

## *PROCEDURAL AND FACTUAL BACKGROUND*

### 1. *Procedural History*

According to plaintiff's complaint, she rented an assigned parking space in the subterranean parking garage which is at issue in this case. The parking area is reserved for tenants of the Coast Savings building at 1180 South Beverly Drive, in Los Angeles. The complaint alleges plaintiff conducted accounting business activities in a suite in the office/bank building. The complaint further alleges that on Thursday, April 8, 1993, at around 11:00 a.m., the day and time she was attacked, defendants failed to take appropriate security measures for this parking garage, and their inaction resulted in the attack upon her and in her consequent pain, suffering and extreme emotional distress, as well as past, present and future medical expenses and loss of income.

This suit was filed on March 11, 1994. Apcoa filed its motion for summary judgment on December 21, 1994, contending that neither it, nor Arman, owed a duty to make the garage more secure because the attack on plaintiff was not reasonably foreseeable. Apcoa also contended it had no liability to plaintiff as it owed no duty to her. It justified that conclusion on the grounds that it neither owned nor occupied the land where she was attacked, nor did it have any contractual responsibilities to plaintiff under its contract with Arman because that contract only required Apcoa to collect rents on the parking space. On February 3, 1995, defendant Arman filed papers by which it partially joined in and partially opposed Apcoa's motion. Arman's papers challenged Apcoa's assertion that Apcoa had no contractual duties which would make

it liable to plaintiff. Arman cited insurance and indemnity portions of the contract between itself and Apcoa. The motions were heard March 13, 1995, and granted. The record reflects that the trial court based its decision on the issues of foreseeability and duty. Judgment was entered April 5, 1995. This appeal followed.

2. *Evidence Presented to the Trial Court*

a. *Plaintiff's Evidence*

In her declaration filed in opposition to defendants' summary judgment motions,[1] plaintiff stated she had entered the underground parking garage on the day in question at 11:00 a.m., and parked in her assigned space. She exited her vehicle, leaned back into the car to remove items from the back seat, and when she turned around, a man in a ski mask was pointing a gun at her. She tried to talk her way out of harm, but was forced back into the car and sexually assaulted. Her attacker was not caught. Plaintiff stated that for several months preceding her

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[1] Several declarations were filed in support of plaintiff's opposition to the motions for summary judgment. There is no indication in the record that defendant Apcoa filed evidentiary objections to these declarations. Although defendant Arman did file such objections, the record contains no ruling on those objections. The result is that we deem waived any objections which defendants may have had to the declarations. (Code Civ. Proc., § 437c, subds. (b), (c) & (d); *Ann M. v. Pacific Plaza Shopping Center, supra*, 6 Cal.4th at p. 670, fn. 1.) Indeed, the order granting the motions states that the trial court considered *all* the evidence set forth in the papers submitted by the parties, and the inferences reasonably deducible from that evidence.

attack, the overall condition of the garage had deteriorated. It was not unusual for several lights to be out, and this would cause darkened areas in the garage. There were lights out in the immediate area of her parking space.[2] On the day of her attack, the garage "had several darkened areas that provided vantage points from which someone lying in wait until after the morning influx of tenants could observe a lone woman arriving in her car as easy prey." Several darkened storage areas would provide a place to hide. She smelled urine at various times during her walks to and from the garage. The garage was not kept clean. Plaintiff never saw defendants' employees monitoring or inspecting the garage. After the attack on her, she learned the security cameras in the garage had not been working for months.

A declaration from plaintiff's attorney, Kelly Duenckel, states that on October 25, 1994 (18 months after the attack on plaintiff), Ms. Duenckel examined the parking garage in question and found that at least 12 light bulbs were burned out and four lights were out in the row of parking spaces where plaintiff used to park. She observed that the storage spaces in the garage were dark and would provide an ideal hiding place, and at least one smelled of urine and had a cot by it. Both Duenckel and plaintiff stated in their declarations that these storage spaces were cordoned off with chain link fence; however, Duenckel indicated it appeared that "anyone could have

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[2] Plaintiff does not indicate when these lights near her parking space were out [i.e., whether they were out before, after, and/or on the day of her attack], but she says generally that the parking garage was not well lighted.

access to these storage spaces." Duenckel also observed that the video cameras above the elevator doors were not functioning. She stated the garage bore no indication that it was regularly maintained.

Retired Pasadena police chief, Robert McGowan, was deposed. McGowan testified that underground parking lots are potential places for criminals to lie in wait. His department worked with a mall and a department store in Pasadena that have underground parking facilities. The purpose was to warn of the dangers of such facilities. He stated that covered parking structures, underground or overground, present a more difficult security problem than surface lots because of visibility and opportunity problems.

In his deposition testimony, Zacaria Simantob (whom plaintiff's papers describe as being "from [defendant] Arman"),[3] stated that the subject garage had a camera but it did not function because Arman was not legally required to have a functioning camera. In an answer to an interrogatory propounded by plaintiff, Arman asserted that pursuant to the contract between Apcoa and Arman, Apcoa is responsible for injuries occurring in the parking garage and Arman is not responsible.

Other evidence was presented by plaintiff. Coast Savings' records show that the branch of that institution where the parking garage in question is located had nine robberies, including an armed robbery, between February 1991 and February 1994, with two occurring in 1991, four

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[3] Mr. Simantob is a general partner of Arman.

in 1992, two in 1993 (January and August), and one in January 1994. An injury occurred in one of the robberies.

b. *Defendant Apcoa's Evidence*

Apcoa presented a declaration from the aforementioned retired police chief, Robert McGowan. He stated he is a self-employed security consultant, working in that capacity for nine years. He has investigated or overseen investigations for many parking lot assaults and has been retained as an expert witness on 29 matters involving parking lots and structures. On September 7, 1994 (17 months after the assault on plaintiff), he inspected the subject parking facility and found its size to be around 200 feet by 225 feet. It has 79 parking spaces. He found the lighting "sufficient to clearly view from one side of the garage to the other in any direction." Although there are support columns in the garage, they "do not seriously obstruct the overall view of the garage from any point within the garage." There is an electronically operated gate for vehicles entering the garage, two passenger elevators to the building lobby, and a stairwell to the lobby.

McGowan offered several opinions. He stated that because there are at least three entrances to the garage through which an assailant can enter, and because people come and go during the business day, "there is no effective way to prevent a person from entering the garage or to confirm each person's identity and reason for entering the garage." Closing the garage door is not effective because a person can wait for a car to pass through the gate and then walk into the garage while the gate is closing, or enter in a vehicle himself if he is a tenant.

There is no way to completely guard against the type of assault experienced by plaintiff. Because of the small size of the garage, the "minimal or no criminal activity," the relatively unobstructed view throughout the garage, and the presence of drivers coming and going, posting a security guard would be an unreasonable burden on defendants. The bank robberies at Coast Savings are "not an indication that there is any greater likelihood of a sexual assault crime occurring in the subterranean garage" because the bank premises are located "on the other end of the structure from the entrance to the parking garage and the behavior of a bank robber is to immediately escape the area where his crime is committed, not to lie and wait for a victim."

Regarding the matter of whether Apcoa was responsible for security provisions in the underground parking area, Arman's general partner Zacaria Simantob stated in his deposition that he did not think Apcoa and Arman have an agreement for Apcoa to provide security services for the underground parking garage. A copy of the contract between Arman and Apcoa was presented to the trial court. The contract provides for Apcoa to manage the underground garage as well as two surface lots, one located at the building premises and one located nearby. Apcoa is to act as the exclusive manager of the three parking facilities, as an independent contractor, and "manage, supervise, and operate" them for Arman. Regarding the underground garage, Apcoa is to "supervise the proper and efficient parking" therein. Apcoa is required to supply and pay a full time parking attendant (for the surface lots) and purchase at its own expense, licenses and "all appropriate insurance as is generally

provided in connection with the operation of Parking Facilities." Insurance includes "fire, theft, property damage, minimum garage keeper's liability of $250,000, and [workers'] compensation. Appropriate insurance shall be deemed to be a comprehensive general liability insurance policy with a single liability limit of $1,000,000 for bodily injury and property damage." The bodily injury insurance is for both Apcoa's employees and others. The contract also contains indemnity provisions benefiting Arman in connection with Apcoa's management of the parking facilities.

Zacaria Simantob's declaration states Arman purchased the subject building in 1982 and he, together with other general partners, is responsible for managing it. He knows of no attack on anyone in the parking garage from the day the partnership purchased the building until the assault on plaintiff. He was informed of the bank robberies but has never known any of the robberies to involve criminal activity in the garage. He did not state when he was informed of the robberies.[4]

## *ISSUE ON APPEAL*

The critical issue in this case is whether defendants owed a duty of care to plaintiff with respect to the security of the commercial parking garage owned and operated by them.

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[4] However, as discussed below, a landowner has a duty to "exercise reasonable care to discover that criminal acts are being or are likely to be committed on its land." (*Ann M. v. Pacific Plaza Shopping Center, supra*, 6 Cal.4th at pp. 679-680 (hereinafter "*Ann M.*").)

## *DISCUSSION*

1. *Standard of Review*

To prove that she has a valid cause of action against defendants for negligence, plaintiff must show (1) defendants owed her a duty of care, (2) defendants breached that duty, and (3) she suffered injuries which were proximately caused by defendants' breach of duty. (*Ann M., supra,* 6 Cal.4th at p. 673.) In an appeal from a summary judgment, the order granting the motion for summary judgment must be reviewed de novo. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 474.) A motion for summary judgment is properly granted where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant meets "his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (*Id.*, subd. (o).) If the defendant meets this burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Ibid.*) The responsibility of the trial court is to discover whether the litigants possess evidence which would require the weighing procedure of a trial. (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1478.) The affidavits of the moving party are strictly construed and those of the opposing party liberally construed, and any doubt as to whether the motion should be granted results

in the denial of the motion. (*Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 866.)

As we have already noted, the resolution of this appeal primarily involves the question whether defendants owed a duty of care to the plaintiff, given the factual circumstances shown by the evidence when that evidence is examined under the foregoing standards.

2. *The Concepts of "Duty" and "Foreseeability" in Negligence Law*

Civil Code section 1714 states in relevant part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." This *duty of care* enunciated in section 1714 is a fundamental principle. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112.) "[I]t is clear that in the absence of statutory provision declaring an exception to [this] fundamental principle . . . no such exception should be made unless clearly supported by public policy. [Citations.] [¶] A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are [1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of

imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved."[5] (*Id.* at pp. 112-113.) "The foreseeability of a particular kind of harm plays a very significant role in this calculus [citation]. . . . " (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.)[6] "[A]lthough the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." (*Rowland, supra,* at p. 119.)

The rules just stated have general application to negligence cases. The existence of a duty of care and its scope, i.e., its boundaries, are questions of law to be determined by the trial court on a case-by-case basis. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124, modified in part on another point in *Ann M., supra,* 6 Cal.4th at p. 679, and disapproved on another point in *Ann M.* 6 Cal.4th at p. 678.) When examined by an appellate court, duty and scope are reviewed de novo. (*Ann M., supra,* 6 Cal.4th at p. 674.) Duty " 'is a shorthand

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[5] In subsequent portions of this opinion, we refer to these enumerated considerations as the "*Rowland* factors."

[6] Foreseeability "is an elastic factor"; the degree of foreseeability necessary to warrant finding a duty of care varies in each case depending on how great or small the burden of preventing the harm, and whether there are strong public policy reasons for preventing the harm. The greater the burden of preventing harm, the higher degree of foreseeability that may be required before a duty is imposed, absent other strong public policy factors. Likewise, the lighter the burden of preventing harm, the lower the degree of foreseeability required for the imposition of a duty. (*Ann M., supra,* 6 Cal.4th at pp. 678-679; *Gomez v. Ticor* (1983) 145 Cal.App.3d 622, 629-630.)

statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' (Prosser, Law of Torts, [3d ed. 1964] at pp. 332-333.)" (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.)

Landowners are required to "maintain land in their possession and control in a reasonably safe condition." (*Ann M., supra,* 6 Cal.4th at p. 674 [citing Civ. Code, § 1714 and *Rowland v. Christian*].) "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against *foreseeable* criminal acts of third parties that are likely to occur in the absence of such precautionary measures. [Citations.]."[7] (*Ibid.*; italics added)

The several *Rowland* factors are considered "in determining the existence and scope of a [landowner's] duty in a particular case." (*Ann M., supra,* 6 Cal.4th at p. 675, fn. 5.) Regarding the primary factor of foreseeability, a landowner's "duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated. [Citations.] [¶] In this, as in other areas of tort law, foreseeability is a crucial factor in determining the existence of duty. [Citations.]" (*Id.* at pp. 676-677; accord *Dillon v. Legg, supra,* 68 Cal.2d at p. 739 [foreseeability of risk is of

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[7] The *Ann. M.* court found that the duty to protect from wrongful acts of third persons also benefits employees of commercial tenants. (*Ann M., supra,* 6 Cal.4th at p. 675.)

primary importance unless there are overriding policy considerations].) However, a landowner has a duty "to exercise reasonable care to discover that criminal acts are being or are likely to be committed on its land." (*Ann M., supra*, 6 Cal.4th at p. 679.)

We have previously stated that the existence and scope of a defendant's duty of care are questions of law for the court to determine. Likewise, "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court. [Citations.]"[8] (*Ann M., supra*, 6 Cal.4th at p. 678.) Thus, it also is examined de novo by the reviewing court. In *Isaacs v. Huntington Memorial Hospital, supra*, 38 Cal.3d at p. 124, the court relied on the Restatement Second of Torts, section 344, comment (f), to detail the "foreseeability" circumstances under which the duty of a landowner to protect others from the wrongful acts of a third party arises: " 'Since the [owner of land] is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to

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[8] The jury also considers the matter of foreseeability, however in "two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury." (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 573, fn. 6.)

endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.' " (Italics omitted.)

Legal foreseeability does not mean what one court described as "objective foreseeability," i.e., "the logical opposite only of impossibility." (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 30l, 306.) Using objective foreseeability, "[o]n a clear day you can foresee forever. [Citation.]" (*Id.* at p. 307.) Thus, courts temper objective foreseeability with subjective reasonableness and apply this "reasonably foreseeable" standard in calculating whether a defendant owed a plaintiff a duty of care, thereby "bring[ing] imposition of duty in line with practical conduct." (*Id.* at pp. 306-307.) The court determines whether "the degree of foreseeability is high enough to charge the defendant with the duty to act on it." (*Id.* at p. 307.) However, " 'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' (2 H[illegible]er & James, Law of Torts [1956] § 18.2, at p. 1020.)" (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57.)

3. *The Ann M. Case*

Defendants rely heavily on *Ann M.* to support the judgment, and the record shows the trial court considered that case in making its decision. In *Ann M.*, the court rejected, *in part*, its previous unanimous ruling in *Isaacs v. Huntington Memorial Hospital, supra*, 38 Cal.3d 112 (hereinafter "*Isaacs*"), regarding whether, in a suit against a landowner which is prompted by the criminal acts of a third person, it is necessary for the plaintiff to show "prior similar incidents" of a criminal nature in order to prove foreseeability of harm and hold the landowner responsible for the injuries suffered by the plaintiff at the hands of the third person. The *Ann M.* court stated that the rule announced in *Isaacs* regarding "prior similar incidents" needed "refinement." (*Ann M., supra*, at p. 678.) In *Isaacs*, the court had concluded that when an analysis of a case is made to determine whether the defendant had a duty of care to the plaintiff, the foreseeability factor should be examined using all the circumstances of the case, rather than only focusing on the existence or nonexistence of prior similar incidents on the premises, the existence of which would be helpful in determining foreseeability but not necessary to find foreseeability. (*Isaacs, supra*, 38 Cal.3d at pp. 126-129.) In *Isaacs*, the court determined that the "prior similar incidents" test of foreseeability is "fatally flawed" for several reasons. It "leads to results which are contrary to public policy" because it discourages landowners from protecting premises they know are dangerous, and it gives landowners a "free" assault, robbery, vandalism or other attack upon a plaintiff-victim before they can be held liable for such acts occurring on their property. Moreover,

such a rule lets courts come to different conclusions as to how similar in nature, close in time, and close in proximity the prior incident must be. Additionally, equating foreseeability of a particular act with the existence of previous similar incidents had already been rejected in negligence cases involving accidents. (*Id.* at pp. 125-126.) In *Ann M.* however, the court concluded that it was justified in revisiting the *Isaacs* "totality of the circumstances" rule for determining foreseeability.[9] (*Ann M., supra,* 6 Cal.4th at p. 678.)

In *Ann M.*, the court addressed the narrow question of whether the owner of a strip mall shopping center, in fulfilling its duty to maintain the common areas of its premises in a reasonably safe condition, *must provide security guards for those areas.* The court determined that on the facts of the case before it, the scope of duty owed by the defendant to the plaintiff did not include providing security guards for the common areas of the shopping center. The court based its conclusion on the absence of prior incidents similar to the one which injured the plaintiff. Plaintiff had been raped while working in a store in the shopping center. The store, a photo processing service, was located in a secluded area of the shopping

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[9] Noting that several appellate courts had criticized the *Isaacs* court's "apparent abandonment" of the "prior similar incidents" rule, the *Ann M.* court stated, "Unfortunately, random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable. Upon further reflection and in light of the increase in violent crime, refinement of the rule enunciated in *Isaacs* . . . is required." (*Ann M., supra,* 6 Cal.4th at pp. 677-678.)

center. The shopping center generally contained about 25 commercial tenants. The lease between the photo processing service and the defendant owner of the strip mall gave the defendant the right to police the common areas of the mall, but did not impose a duty on the defendant to do so. The plaintiff was raped, and the store robbed, at 8 a.m. There was evidence that prior to the assault, there had been incidents of bank robberies, robberies of shoppers, violent purse snatchings, break-ins and assaults by a man who would come up behind women shoppers and pull down their pants. The defendant responded with evidence that its records contained no references to violent criminal acts in the shopping center prior to the rape of the plaintiff and that it was defendant's standard practice to record instances of violent crimes. There was also evidence that prior to the rape, employees and tenants in the shopping center were concerned about their safety because of transients who loitered in the common areas; and the police had been called twice about such persons. The tenants discussed hiring foot patrols but determined it would be too expensive. They asked defendant to provide patrols but defendant declined. Ultimately, the tenants hired a security company to drive by the center several times a day. Plaintiff was raped thereafter. There was no evidence that the rapist was a loitering transient.

Noting that landlords have a duty to take reasonable steps to secure the common areas of their property against foreseeable criminal acts of third parties (*Ann M., supra*, 6 Cal.4th at p. 674), the court stated that the heart of the case before it was whether the defendant "had reasonable cause to anticipate that criminal conduct such as rape would occur in the shopping center premises

*unless it provided security patrols in the common areas.*" (*Id.*, at p. 676; italics added.)[10] In revisiting *Isaacs*, the court set down two general rules regarding a landowner's duty *to provide security guards*. First, because of the expense, the social impact (i.e., the monetary effect on small businesses in high crime areas, where residents are often not able to bear the rise in the cost of goods and services necessary to pay for security patrols), and the vagueness of how many patrols are necessary to curb crime, "*a high degree of foreseeability* is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards." (*Id.* at p. 679, emphasis added.) Second, this "*requisite degree of foreseeability* rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (*Ibid.*, fn. omitted; italics added.) However, the court left open the "possib[ility] that some other circumstances such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises could provide the requisite degree of foreseeability." (*Ibid.*, fn. 7.)

The *Ann M.* court found that the evidence presented by the parties in that case precluded a finding that violent criminal assaults were sufficiently foreseeable to impose a duty on the landlord to provide security guards in the common areas. First, even assuming the landlord knew of

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[10] Indeed, review was granted in *Ann M.* for the expressed and limited purpose of determining "whether the scope of the duty owed by the owner of a shopping center to maintain common areas within its possession and control in a reasonably safe condition *includes providing security guards in those areas.*" (*Ann M., supra*, 6 Cal.4th at p. 670; italics added.)

the previous criminal activities at the shopping center, they were not similar in nature to the crime plaintiff suffered – rape. Second, none of the plaintiff's other evidence (the presence of transients and the statistical crime rate in the surrounding area) was "sufficiently compelling to establish the high degree of foreseeability necessary to impose upon [the landlord] a duty to provide security guards in the common areas." (*Ann M., supra,* 6 Cal.4th at p. 680.)

Thus, *Ann M.* is a case which considers when the scope of a landlord's duty of care to keep its property in a reasonably safe condition will include the duty to provide security guards to protect persons against crime perpetrated by third parties. The *Ann M.* court (1) set a specific level of foreseeability (i.e., a high degree of foreseeability) and (2) prescribed how that level of foreseeability must be shown (by prior similar incidents or something equally compelling). However, *Ann M.* did not totally rewrite *Isaacs* on the issue of prior similar incidents, but only addressed that issue vis-a-vis the claimed necessity of a specific preventative measure: security guards. (*Ann M., supra,* 6 Cal.4th at pp. 670, 673, 674, 676, 679, 680.) *Ann M.* thus does not preclude the application of *Isaacs*'s directive to analyze foreseeability using the totality of circumstances in a case where those circumstances include, as they do here, such factors as an inherently dangerous premises and a history of prior (although not similar) criminal acts on nearby premises.

4. *The Issue Left Unresolved By Ann M.*

Our conclusion that a lack of prior similar incidents is not dispositive of this appeal is supported not only by *Ann M.*'s narrow focus on the existence of a duty to provide security guards, but also upon the fact that the court expressly left open the question of "whether some types of commercial property are so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner's duty of care." (*Id.* at p. 680, fn. 8.)[11] Although the court phrased the question only in terms of a duty to provide security guards, the basic issue it left unresolved is whether certain types of commercial premises may be so inherently dangerous as to present a reasonable foreseeability that crimes against customers or tenants will be committed by third persons if the landowner does not take reasonable preventative measures which may or may not include security guards. The court specifically mentioned two particular types of such commercial property – all-night convenience stores *and parking garages*. The court stated that the plaintiff had "offered no evidence to show that, *like a parking garage* or an all-night convenience store, a retail store located in a shopping center creates ' *"an especial temptation and opportunity for criminal conduct."* ' "[12] (*Ibid.*, italics added.)

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[11] This express reservation by the *Ann M.* court is significant but has been ignored by our dissenting colleague.

[12] The record in this case reflects a recognition that parking structures are tempting to criminals. Apcoa's own expert testified that parking garages are potential places for criminals to lie in wait, and they present more difficult security problems than surface parking lots.

In the instant case, we deal with a violent crime committed in just such a commercial location, and so are squarely presented with the issue left open by *Ann M.* We address that issue by looking at the total circumstances presented by this case, with our primary focus upon the nature, character and condition of the particular premises (i.e., a commercial parking garage[13]) as well as the history of criminal activity in or about such premises. If we find, given all of the circumstances, that the assault on plaintiff was reasonably foreseeable then we must look to the remaining *Rowland* factors to determine if the defendants had any duty of care to plaintiff to protect her from the criminal acts of third persons, whether by use of security guards or some lesser means of deterrence.

### 5. *The Inherently Dangerous Nature of Commercial Parking Structures and the Issue of Foreseeability of Harm*

*Ann M.* was not the first case to recognize that commercial parking structures may be dangerous places when it comes to criminal conduct. *Gomez v. Ticor, supra,* 145 Cal.App.3d 622 (hereinafter "*Gomez*") is a wrongful death case brought by relatives of a person shot and killed one night when he entered the parking garage of the defendant's office building and came upon a robbery

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[13] In our analysis of this issue, we do not include single-level, uncovered surface parking lots because their physical characteristics do not present the level of danger, discussed *infra,* which is inherent in a covered parking garage.

in progress. The *Gomez* court addressed "the foreseeability of armed robbery in an office building's commercial parking structure and the existence of minimal precautions to protect the patrons thereof."[14] (*Id.* at pp. 625-626.) In doing so, the court stated: "in its very operation of a parking structure, defendant may be said to have created 'an especial temptation and opportunity for

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[14] In *Gomez*, the plaintiffs introduced evidence of "the general unsafe character of the neighborhood" and of fourteen thefts and four other nonviolent crimes that occurred in the building within three years prior to the murder. Additionally, they presented evidence that the security system which was supposed to monitor the parking garage was not functioning on the night of the attack (the intercom that connected the parking attendant with the security booth in the lobby of the building was "habitually turned off at the lobby console," the camera that monitored the entry ramp used by the assailants was not working, and the gate to the entry ramp was generally left open at night). (*Gomez, supra,* 145 Cal.App.3d at p. 626.) The court did not find that the evidence regarding the general unsafe character of the neighborhood would "establish sufficient foreseeability to warrant the imposition of a duty." (*Id.* at p. 628.) However, it found that based on the evidence of the many previous crimes on defendant's premises in the past three years, theft and vandalism "appear to have been foreseeable in the parking structure" and therefore it may also have been foreseeable that a patron of the parking structure would come upon such a crime and himself be subject to an act of violence. (*Ibid.*)

The *Gomez* court concluded that the foreseeability of such an attack was a question of fact for the jury. (*Gomez, supra,* 145 Cal.App.3d at p. 628.) This conclusion was rejected by *Ann M.*, which as noted above, reaffirmed that when foreseeability is being analyzed to determine the existence or scope of a duty of care, it is a question of law to be determined by the court. (*Ann M., supra,* 6 Cal.4th at p. 678.)

criminal misconduct,' thus increasing the foreseeability of the attack. (Prosser, Torts (4th ed. 1971) p. 174.) In making this observation, we note the unique nature of a parking complex, which invites acts of theft and vandalism. In such structures, numerous tempting targets (car stereos, car contents, the cars themselves) are displayed for the thief; high walls, low ceilings and the absence of the cars' owners allow the thief or vandal to work in privacy and give him time to complete his task. Such circumstances *increase* the likelihood of criminal misconduct. In addition, the deserted, labyrinthine nature of these structures, especially at night, makes them likely places for robbers and rapists to lie in wait. Robbery, rape, and violent consequences to anyone who interrupts these crimes, may thus also be foreseeable." (*Id.* at p. 628, italics added.)[15]

This descriptive language from *Gomez* captures the essence of the physical characteristics of the average commercial parking structure. Like the *Gomez* court, we find that the peculiar characteristics of commercial parking garages, to which the general public necessarily has full and easy access, increases the likelihood of *many* types of criminal activity and thus increases the foreseeability of crime *in general.*[16] (*Gomez, supra,* 145 Cal.App.3d at p.

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[15] Citing *Gomez,* the Supreme Court in *Isaacs* noted the magnetic effect that parking garages have on the criminal element. (*Isaacs, supra,* 38 Cal.3d at p. 130.)

[16] We expressly exclude from this finding, multi-residential parking garages which have restricted access and may not necessarily present the problems associated with the public commercial garage. In addition, for the reasons noted in footnote 13, *ante,* we also exclude single-level, uncovered

628.) Given the opportunity these structures present for criminals to prey on persons utilizing them, the recent history of ever increasing numbers of criminal assaults occurring in such structures,[17] the fact that due to their very nature and their location on private property they are not patrolled by the police,[18] *and taking into account the physical conditions presented at this particular location as well as its recent history of criminal activity, including at least seven serious felonies (robberies) at the adjacent bank premises during the two year period preceding the assault on plaintiff,* we hold, as a matter of law, that a high degree of foreseeability existed that patrons of the defendants' commercial parking garage might become victims of third person criminal assaults, such as robberies, shootings, rapes, or some other form of physical aggression. We necessarily

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surface parking lots. That is not to say, as our dissenting colleague incorrectly assumes, that such parking lots or structures may not in a specific case present similar problems. We simply do not have any reason to consider them here. We have excluded them because we expressly limit our analysis and holding to public *commercial* parking structures.

[17] See, e.g., Lee, *Lots Of Trouble-Courts Begin To Award Damages To Victims Of Parking-Area Crime,* Wall Street Journal (Apr. 23, 1997), p. A1, col. 6.

[18] This obvious and undisputed characteristic of the commercial parking structure seriously undercuts the argument of our dissenting colleague to the effect that it is unfair to the owners and operators of commercial parking structures to impose upon them the crime prevention burden which, under ordinary circumstances, should be a public responsibility. One of the reasons that parking structures are considered to be inherently dangerous is that they are on private property and are not policed except to the extent that those parties making a profit from their operation can be persuaded to do so.

further hold that, given all of such circumstances, specific evidence of prior similar criminal misconduct is not required in order for the defendants to have a duty to provide reasonable preventative measures which, depending on the total circumstances, might or might not include security guards.

### 6. *Analysis of The Other Rowland Factors for Determining Existence and Scope of Defendants' Duty of Care*

Having found foreseeability in this case, which is a primary *Rowland* factor in determining both duty and its scope, we next determine whether this foreseeability, when balanced with other *Rowland* factors, shows defendants had a duty to provide reasonable security measures to protect plaintiff.[19] We address those *Rowland* factors which are most relevant when liability is sought to be imposed on owners and managers of commercial parking structures. Those factors are the availability and cost of insuring against the risk, the policy of preventing future harm, the moral blame in the defendant's conduct, and the burden to defendant and the community of imposing a duty to provide security measures and requiring liability for breach of the duty. Do these factors, when balanced with the high degree of foreseeability of crime in general which we have found with respect to defendants' commercial parking structure, cause us to conclude that defendants owed plaintiff a duty of care to

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[19] A foreseeable injury does not necessarily compel the conclusion that a duty of care exists. (*Sturgeon v. Curnutt, supra,* 29 Cal.App.4th at p. 306.)

undertake reasonable security measures in order to protect her from foreseeable third party criminal acts? We find they do.

The evidence in this case shows defendants have already provided between themselves for the purchase of liability insurance for bodily injury and damage to property. Liability insurance has presumably been purchased by Apcoa and its cost has presumably already been passed on to tenants utilizing the parking facilities for themselves and their customers and clients. Indeed, there is no indication that such insurance is not generally available to owners and managers of parking structures.

Next, there is a strong public policy which favors the prevention of future harm in defendants' commercial parking garage. While the *Gomez* court found in 1983 (the year that case was decided), that "[p]arking structures are relatively new fixtures in 'the setting of modern life'," (*Gomez, supra,* 145 Cal.App.3d at p. 629) this is not the case anymore. Absent sufficient and desirable mass transit, parking garages are, and will continue to be, as common as vehicles themselves. They are an entrenched part of our lives, whether in shopping malls, educational institutions, sports facilities, government complexes, or the work environment. The need for such facilities can hardly be avoided, especially given California's love affair with the automobile and its lack of effective mass transportation. Therefore, they should be made to be both functional and safe. However, as they are located on private property, they are not routinely, or even sporadically, patrolled by the police. It must be the responsibility of the owners and operators of commercial parking garages or structures to make them reasonably safe for use by

tenants and visitors. Public policy dictates that persons who profit from owning or managing facilities, which by their very nature create "an especial temptation and opportunity for criminal conduct," should supply at least the minimal amount of security warranted under the particular circumstances of the case. Whether or not there is moral blame attached to defendants' conduct in the way they operated and managed the parking garage, the finding of a duty of care furthers public safety.

As for the economic consequences of such a duty of care, there is no evidence that the cost of providing sufficient protection cannot reasonably be passed on to the persons who utilize the parking garage.[20] For example, there is no evidence that such tenants cannot bear the added expenses themselves or pass it along to their customers. The "cost" of parking should include its entire cost, including reasonable security measures. Further, it is more reasonable to have all persons utilizing a commercial parking structure pay for the economic cost of security, and thereby realize the benefit of that security, than it is to make an individual user bear the physical and emotional cost of a criminal act which results from an owner's or manager's failure to employ sufficient crime deterrence measures. (Cohen v. Southland Corp. (1984) 157 Cal.App.3d 130, 142-143.)

Defendants argue that there was "no effective way" to keep out persons who might engage in criminal conduct and that any requirement for the posting of a

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[20] According to the plaintiff's complaint, those persons are the tenants of the associated office building.

security guard would impose "an unreasonable burden." With respect to the first point, it is not necessary to succeed in order to persevere. That the task of making the garage reasonably safe might well have been difficult of achievement, cannot justify doing nothing. As to the second point, there is nothing in the record, other than the conclusionary declaration of one of defendants' experts, to demonstrate that any "unreasonable burden" would necessarily be involved; as we have already noted, it is not at all clear that security guards would have been required. The record does demonstrate that defendants were operating a commercial parking garage which, by its very nature and actual condition, presented an unreasonable risk of harm to its patrons. It is this circumstance which results in the imposition of a duty of care.

We have concluded that a criminal assault on plaintiff was reasonably foreseeable and, after consideration of the other relevant *Rowland* factors, we hold that defendants owed to plaintiff a duty of care to provide reasonable security.

### 7. *Breach Of Duty And Causation*

Whether the defendants have breached their duty to plaintiff by a failure to provide security guards or some lesser security measures will be a question of fact for the jury,[21] unless the state of the evidence permits the trial

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[21] Lesser security measures might include, for example, parking attendants who provide maintenance to the garage and check for loitering (thereby providing a "presence" in the garage); closed circuit monitoring utilizing cameras together

court to resolve the issue as a matter of law. As the court noted in *Cohen v. Southland Corp.*, imposing a duty to make an all-night convenience store "reasonably safe against criminal activity is not coincident with requiring the hiring of armed guards. Rather, a jury could determine the duty was more than adequately fulfilled by the less onerous, relatively inexpensive robbery and/or violence deterrence measures described in the Southland-commissioned study. . . . " (157 Cal.App.3d at p. 142.)

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with sufficient posted signs to let a would-be criminal know that his actions, including dismantling the cameras, will be detected (the monitoring might possibly be done at a panel at which more than one parking structure is monitored); gates and secured doors; strong lighting, and motion sensitive lights. The court in *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503 recognized that lighting can help deter criminal conduct. In *Slapin v. Los Angeles International Airport* (1976) 65 Cal.App.3d 484, 488 the court stated: "That a mugger thrives in dark public places is a matter of common knowledge. [Citations.]." *Slapin* involved a personal injury suit stemming from an attack on the plaintiff in a parking lot which the plaintiff contended was made dangerous by insufficient lighting. In *Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 514, the court recognized that security cameras are designed to deter crime "because of the potential of identification and capture." In *Gomez, supra,* 145 Cal.App.3d at pp. 632-633, the court stated: "the peculiar attraction which a large commercial building's unattended parking structure poses for the criminal may necessitate some minimal human or mechanical means of protecting patrons. . . . Indeed, we are convinced that a monitored parking complex is an infinitely safer place than one which is vacant and unattended." Additionally, a parking garage which is regularly maintained (cleaned, light bulbs replaced, etc.) gives the appearance that an attendant may appear at any time while one which is left unkempt and dark has just the opposite effect.

Based upon evidence which will doubtless, and perhaps necessarily, include informed expert opinion, a jury can properly decide what security measures were reasonably required when it reviews the facts of the case and determines whether the plaintiff met her burden of proving the defendant's breach of duty and causation.[22] "Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. [Citation.] The jury must decide whether the security was adequate." (*Isaacs, supra,* 38 Cal.3d at p. 131; accord *Cohen v. Southland Corp., supra,* 157 Cal.App.3d at pp. 142-143; *Gomez, supra,* 145 Cal.App.3d at p. 633 [the *Gomez* court noted that the duty of protecting parking structures "may be fulfilled by various means, and the sufficiency of these means may often be decided by 'a lay jury, after the fact.' [Citation.]"].)

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[22] The jury will analyze the totality of circumstances of the case to determine breach and causation. These include factors such as the history of crime in the whole of the premises, including the parking garage; the nature of the parking structure itself (e.g., number, size, and layout of parking floors, and whether they are above or below ground); the predominant use made of the parking garage (whether used primarily for purposes where there is a continuous turnover of parking activity [such as at a shopping mall] or for longer-term parking [such as by persons going to their place of employment] ); the nature of the surrounding neighborhood; the effectiveness of the security measures present when the plaintiff was injured, or the lack of any security measures; and other relevant factors in the case.

## *CONCLUSION*

The criminal assault on plaintiff was reasonably foreseeable and the defendants owed a duty of care to plaintiff to provide reasonable security in their commercial parking garage.[23] Whether the defendants, in their management and operation of the garage, met their duty to plaintiff, and if not, whether the breach of that duty was a substantial factor in plaintiff's injuries are issues which will have to be addressed on remand.

## *DISPOSITION*

The judgment is reversed and the cause is remanded for further proceedings consistent with the views expressed herein. Costs on appeal to plaintiff.

*CERTIFIED FOR PUBLICATOIN*

CROSKEY, Acting P.J.

I concur:

ALDRICH, J.

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[23] Defendant Arman's duty of care exists because it owns the garage. As for defendant Apcoa, there was sufficient evidence of a contractual duty to act as exclusive manager of the parking structure and "manage, supervise, and operate" it, including supplying liability insurance.

I respectfully dissent. I would affirm the trial court's ruling.

The majority has replaced the concept of duty based on foreseeability with an "inherently dangerous" condition theory. The majority finds that commercial parking structures, while never specifically defined,[1] are "inherently dangerous;" and, by their very nature, facilitate the commission of and increase the likelihood of crime. Even though an owner or operator of a commercial parking structure provides sufficient safety measures on a property with no history of prior criminal acts, the majority opinion automatically imposes a duty as a matter of law. This is contrary to established case law.

The issue of duty is a question of law for the court to decide (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674); primarily on the basis of *foreseeability*. (*Id.* at p. 676.) Landlords have a duty to reasonably secure common areas against *foreseeable* criminal acts of third parties. (*Id.* at p. 674.) However, the majority has now held that it is *foreseeable* as a matter of law that criminal conduct will *always* occur in such parking structures.

Under the majority opinion, all commercial parking structure cases will go to the jury, which will then only be required to decide if the duty of care was breached and if that breach was the legal cause of the plaintiff's damage. The better rule is the one adopted by our Supreme Court in *Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th

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[1] The majority specifically excludes from this definition single-level, uncovered surface parking lots and private multi-residential parking garages which have restricted access.

666 which found there was no duty based on a lack of foreseeability. In that case, the issue was "whether [the landlord] had reasonable cause to anticipate that criminal conduct such as rape would occur in the shopping center premises unless it provided security patrols in the common areas." (*Id.* at p. 676.) Since the cost of providing security guards was significant, the court held that the "requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well-established policy in this state." (*Id.* at p. 679, fn. omitted.) In my opinion, this is the test we should be using in this case. We should not be determining duty based on "inherently dangerous" properties. Rather we should be examining the record to ascertain if there have been prior similar incidents of violent crime in the parking structure.

The majority opinion means that owners of these newly identified "inherently dangerous" properties or businesses now have a higher responsibility than the rest of society to prevent criminal behavior. I believe this is too harsh a rule and it will penalize landowners for the inability of society to control crime since, "[u]nfortunately, random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable." (*Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at p. 678.) As the court stated in *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 437-438, "Police protection is, and in our

view should remain, a governmental and not a private obligation. Landowners in high-crime areas ought not to be forced out of the area or out of business altogether by an imposition of liability to the victims of violent crimes which the police have been unable to prevent. [Citation]."

We know that "[a]n action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center, supra*, 6 Cal.4th at p. 673.) We also know that the "existence of a duty is a question of law for the court" (*id.* at p. 674), and that "foreseeability [of the risk] is a crucial factor in determining the existence of duty." (*Id.* at p. 676.) It is also true that landowners must maintain their land in a reasonably safe condition and "[i]n the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against *foreseeable* criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Id.* at p. 674, emphasis added.) "[A] duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be *reasonably anticipated*." (*Id.* at p. 676, emphasis added.) "[T]he scope of the duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed." (*Id.* at p. 678.)

I believe the majority opinion would have detrimental, unintended consequences. Although the majority tries to exclude certain types of parking facilities from its holding and analysis, its expansive opinion will be used

to argue that any parking structure, whether commercial or residential, is "inherently dangerous." I do not see any principled distinction between an "inherently dangerous" commercial parking structure and "private multi-residential parking garages with restricted parking" which the majority excludes from its analysis. Any "dangerous conditions" which could be found in a commercial parking garage will also be found in a "private multi-residential parking garage".

The majority relies on *Gomez v. Ticor* (1983) 145 Cal.App.3d 622 which describes "dangerous conditions" in commercial parking garages as places where "numerous tempting targets (car stereos, car contents, the cars themselves) are displayed for the thief" and "high walls, low ceilings and the absence of the cars' owners allow the thief or vandal to work in privacy and give him time to complete his task." (*Id.* at p. 628.) The *Gomez* court noted that the "deserted, labyrinthine nature of these structures, especially at night, makes them likely places for robbers and rapists to lie in wait. Robbery, rape, and violent consequences to anyone who interrupts these crimes, may thus also be foreseeable." (*Ibid.*) Clearly each element of danger which could be present in a commercial garage could also be present in a multi-residential parking garage.

Whether the parking structure is residential or commercial, the following hypothetical shows the weakness in the majority's opinion. For 30 years Mr. Jones has owned a commercial parking structure which adjoins a dental office. There is a gate at the entrance of the parking structure and an employee who gives out tickets to enter. The parking structure is open from 8 a.m. to 5 p.m.

There has not been a criminal event in the parking structure during the 30 years Mr. Jones has owned it. Under the majority's reasoning, Mr. Jones's commercial parking structure is "inherently dangerous," and Mr. Jones cannot prevail at the summary judgment stage on the basis of duty even though no criminal activity has ever occurred on the property.

The fallacy of the majority's analysis is further illustrated when we compare Mr. Jones's dental office parking structure with a 100-unit apartment complex with a multi-level parking structure, where the residents come and go 24 hours a day. The majority finds that the dental office parking structure is "inherently dangerous" while the 100 apartment parking structure is not. It would appear the dental office parking structure is safer than the apartment parking structure, although this is exactly the opposite of what the majority holds.

Furthermore, my colleagues find that the parking structure in this case is "inherently dangerous" based solely on the features of commercial parking structures as emphasized in *Gomez*. If we were to follow this line of reasoning, then all subways, all hallways in office or residential buildings, all parking garages in residential and commercial buildings, all parking structures at sports events, and all movie theaters, for example, would be inherently dangerous because of their mere existence. Other examples abound; I need not go on.

As one commentator has noted: "Because all businesses attract crime to some extent, they could all be characterized as 'inherently dangerous.' At various times, courts have described parking facilities, [*Gomez v. Ticor*,

*supra*, 145 Cal.App.3d at p. 628] all-night laundromats, [*Castillo v. Sears, Roebuck & Co.* (Tex. App. 1983) 663 S.W.2d 60, 66] emergency room facilities, [*Isaacs v. Huntington Memorial Hosp.* (1985) 38 Cal.3d 112, 129] banks, [*Stalzer v. European Am. Bank* (New York 1982) 448 N.Y.S.2d 631, 635] and college dormitories [*Mullins v. Pine Manor College* (Mass. 1983) 449 N.E.2d 331, 335] as being facilities that attract crime. The mere fact that a crime has occurred almost always allows one to draw the conclusion, after the fact, that the premises were inherently dangerous. Moreover, any duty premised on the idea that the business attracts crime . . . ignores the fact that many such businesses are economically viable precisely because they do not require any on-site labor. Once proprietors are forced to provide security guards at all-night laundromats or at bank teller machines, those operations cease to become profitable. It serves no one to impose a duty which, rather than protecting customers, forces the businesses which they frequent to close. One could also foresee prohibitively high insurance premiums on businesses which have enjoyed an absence of crime in the past but which are considered inherently dangerous by insurance companies. Although these considerations should be used when dealing with a duty to install simple, inexpensive security measures, . . . they should not be sufficient to require landlords to employ expensive security measures, such as private patrol forces." (When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises (1990) 31 S. Tex.L.Rev. 89, 112-113).

Our Supreme Court has stated that "[w]hen deciding whether to expand a tort duty of care, courts must consider the potential social and economic consequences." (*Macias v. State of California* (1995) 10 Cal.4th 844, 859.) The majority has not considered the apparent consequences of its opinion.

I would affirm the trial court's ruling.

KITCHING, J.

Supreme Court, U.S.
FILED
MAY 17 2000
CLERK

(2)

No. 99-1659

In The

# Supreme Court of the United States

SHARON P.,

*Petitioner,*

vs.

ARMAN, LTD., APCOA, INC. dba PARKING SERVICES, INC., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Supreme Court**

## OPPOSITION OF RESPONDENT APCOA, INC. TO PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION AND SUMMARY OF ARGUMENT

This matter involves a state court's adjudication of the rights and liabilities of its private citizens under its common law negligence principles. More specifically, it involves the decision by the California Supreme Court that an owner (Arman, Ltd.) and operator (Apcoa, Inc.) of a parking garage owed no duty to secure the premises against the armed sexual assault committed against Petitioner by a third party assailant. In an attempt to circumvent an unfavorable final result, Petitioner has mischaracterized the decision of the California Supreme Court so as to raise purported due process and equal protection violations where none exist. The simple fact is that no question of federal law, whether constitutional or otherwise, was ever raised, argued or decided at any of the three levels of the state judicial system before this petition was filed.

This Court therefore lacks jurisdiction to review this matter and should deny the Petition for Writ of Certiorari filed by Sharon P.

## MISSTATEMENT OF LAW BY PETITIONER

As a preliminary matter, the question presented by Petitioner misstates the rule applied by the California Supreme Court in this case as a " 'prior similar incidents' rule . . . in which they (sic.) conclude that no duty runs to the first person injured on property by a third party." (Petition, p. i-ii.) The correct rule, established by the California Supreme Court in prior decisions, and faithfully followed by the Court again in this case, is that "a

'high degree of foreseeability' is required in order to find that the scope of a landowner's duty of care includes the hiring of security guards to protect against violent crime by third parties." *Sharon P. v. Arman, Ltd.*, 21 Cal. 4th 1181, 1190, 1199 (1999) (App.10 and 25 to Petition); *see also Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 679 (1993). The Court in this case emphasized that the "crucial factor" in the analysis of a landowner's duty is foreseeability of the harm, and that the scope of duty depends on the type of crime involved. 21 Cal. 4th 1189, 1195. "[D]uty . . . is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." *Id.* at 1195. In doing so, the Court rejected Petitioner's argument that "minimal security measures" short of hiring armed security guards (such as keeping the garage brightly lit, cleaning, and hooking up security cameras) would have deterred the violent sexual assault committed on Petitioner. *Id.* at 1196.

With regard to the issue of foreseeability, the Court carefully examined the evidence presented below and concluded that the sexual assault committed on petitioner in this case was not sufficiently foreseeable to impose the prohibitive cost of hiring round-the-clock armed security guards because there was no evidence of any criminal activity at the garage within the past ten years, (*Id.* at 1195) and there was no evidence of any sexual assaults committed either at the garage, the adjacent commercial building, or any "substantially similar business establishment in the immediate proximity" (*Id.* at 1198). The Court also concluded that the seven bank robberies relied upon by the plaintiff did not supply the sufficient level of

foreseeability because they were not only at a different set of premises, but were substantially dissimilar to the sexual assault in this case. *Sharon P.*, 21 Cal. 4th at 1195. Thus, the Court's holding was far from requiring an identical prior crime at the identical premises for every type of crime before allowing recovery of damages, as Petitioner would have this Court believe.

As such, the court's decision is based on balancing the interests of the aggrieved victim of third party crime against considerations of fairness and reasonable notice to the premises owner/possessor, and not the slightest hint of an "arbitrary or capricious classification" can be found in the Court's decision so as to trigger any due process and equal protection concerns.

## ARGUMENT

### I. This Court Lacks Jurisdiction To Review The Decision Of The California Supreme Court.

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a). Section 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or

statutes of, or any commission held or authority exercised under, the United States.

This Court has consistently held that jurisdiction on writ of certiorari to a state court will not obtain unless there has been an erroneous adjudication of a "substantial" or "important" question of federal law by the state's highest court. *Zucht v. King*, 260 U.S. 174, 176 (1922). *See also Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Uhler v. American Federation of Labor Congress of Industrial Organizations*, 468 U.S. 1310, 1311 (1984); Rule 10 of the Supreme Court Rules. "Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb*, 324 U.S. at 125-126. Even where the State court decision rests in part on an incorrect ruling of a substantial federal question, this Court cannot grant review where the decision rests on an independent and adequate state-law ground that is dispositive of the outcome. *Uhler*, 468 U.S. at 1311. Writ of Certiorari will be "dismissed as improvidently granted because the judgment rests on an adequate State ground." *Wilson v. Loew's Inc.*, 355 U.S. 597, 598 (1958).

The decision of the California Supreme Court in this case rests entirely on the state's common law negligence principles. Review of the decision attached as an appendix to the Petition will readily reveal that not a single question of federal law is mentioned by the court, much less decided by it. This Court therefore lacks jurisdiction to review this matter under its own rules and well-established precedent.

Petitioner's claim that the decision of the California Supreme Court violates the due process and equal protection clauses of the Fourteenth Amendment cannot be made for the first time on certiorari to this Court. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions" (*Id.* at 438) for reasons of "comity to the states, and . . . a constellation of practical considerations." *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 79 (1988). Moreover, when the opinion of the state's highest court makes no reference to the claimed federal issue, as in this case, the Supreme Court will assume that the issue was not properly raised so as to confer jurisdiction on writ of certiorari, and it is up to the Petitioner to prove otherwise. *Street v. New York,* 394 U.S. 576, 582 (1969). Petitioner is not in a position to claim that the constitutional issues did not arise until the California Supreme Court issued its decision inasmuch as the same legal principles were used by the trial court in granting the defendants' motion for summary judgment.

Finally, this Court's own rules require the Petitioner to include in the Petition a "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to

review the judgment on a writ of certiorari." Rule 14(g)(i). The absence of such a statement from the Petition in this case in itself attests to the absence of jurisdiction to review the decision of the California Supreme Court.

## II. Differences Of State Law Among The Several States Do Not Confer Jurisdiction Upon This Court.

As an alternative basis for jurisdiction, Petitioner points to some nine other states which have presumably adopted tests other than the one adopted by California for determination of a premises owner/possessor's liability for third party crime. Although conflicts between the individual states as to "an important federal question," may give rise to jurisdiction by this Court, (See e.g. Rule 10(b)), purported "conflicts" as to state tort law issues provide no jurisdictional grounds on a writ of certiorari.

## III. The Applicable Equal Protection Test Is Satisfied.

Assuming, arguendo, the decision of the California Supreme Court afforded any unequal treatment to first victims of crime vis-a-vis recovery of civil damages against the premises owner, there being no "suspect classification" or deprivation of a fundamental right, the state would only need to satisfy a "rational basis test" to pass constitutional muster. *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989). Under that test, the state action need only be rationally related to a legitimate state interest. *Id.* at 23. The significant policy considerations set forth by the court in reaching its decision, including setting of fair

and reasonable parameters of civil liability on business owners and operators for crimes they did not commit, the prohibitive cost of hiring security guards to deter crime, and avoidance of forcing private property owners to act as insurers of public safety, (*Sharon P.*, at 1190, 1994) go beyond the single legitimate interest needed to satisfy the rational basis test.

The balance struck by the California Supreme Court was eminently fair to all concerned, and should not be disturbed for any reason.

## CONCLUSION

For all of the foregoing reasons, Respondent APCOA, Inc., respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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